TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1125

STANDARD OIL COMPANY OF CALIFORNIA,
APPELLANT,

vs.

CHARLES G. JOHNSON, AS TREASURER OF THE
STATE OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

FILED APRIL 8, 1942.

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 17, 1942.

[fols.1-3]

IN SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO

[File endorsement omitted]

No. 63124

Dept. No. 3

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, Plaintiff,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California, Defendant

COMPLAINT FOR RECOVERY OF GASOLINE TAX PAID UNDER PROTEST—Filed May 5, 1941

Plaintiff complains of defendant and for cause of action alleges:

I

Plaintiff is and at all times herein mentioned was a corporation duly organized and existing under the laws of the State of Delaware and qualified to do and doing business in the State of California.

II

Defendant is and at all times herein mentioned was the duly elected, qualified and acting Treasurer of the State of California.

[fol. 4]

III

On or about March 31, 1931, plaintiff obtained from the State Board of Equalization of the State of California a license required of distributors of motor vehicle fuel by section 2 of the Motor Vehicle Fuel License Tax Act and at all times herein mentioned said license was and now is in full force and effect.

IV

On or about April 15, 1941, plaintiff filed with the Board of Equalization of the State of California its verified report of motor vehicle fuel distributor for the month of March, 1941, in which it reported a total taxable gallonage of motor vehicle fuel sold and distributed by it during the month of March, 1941, in the sum of 32,943,203 gallons and in which it protested the inclusion of 17,536 gallons sold and delivered by it to the United States Army post exchanges, as follows: 10,473 gallons sold and delivered by it to 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, 2002 gallons sold and delivered by it to Eleventh Cavalry Post Exchange, Campo, California, and 5,061 gallons sold and delivered by it to U. S. Army Post Exchange, Seeley, California. None of said post exchanges is located on United States military reservations over which the Federal Government has exclusive jurisdiction to legislate.

[fol. 5]

V

On or about the 24th day of April, 1941, plaintiff transmitted to the Honorable Harry B. Riley, as Comptroller of the State of California, four cashier's checks drawn on The Anglo California National Bank of San Francisco in the total sum of $988,296.09 in payment of the tax asserted on sales of gasoline after adjustment for credits; deeming that its sales of motor vehicle fuel to said United States Army post exchanges are not subject to motor vehicle fuel license tax, plaintiff involuntarily and to avoid penalties, interest and costs that might accrue if the tax on such sales of motor vehicle fuel were not paid, made its payment under protest and accompanied its payment with its verified written protest, setting forth its grounds of objection to the legality of said tax. A copy of plaintiff's protest is as follows:

"April 23, 1941.

Hon. Harry B. Riley, State Controller, Sacramento, California

DEAR SIR:

We hand you herewith Cashier's checks payable to you aggregating the sum of $988,296.09 in payment of the tax

appearing to be payable by us for the month of March, 1941, as disclosed by 'Report of Motor Vehicle Fuel Distributor' heretofore filed with the State Board of Equalization covering distribution of motor vehicle fuel for that month, and Notice of Motor Vehicle Fuel Tax #6522. The total taxable gallonage with reference to which the tax is computed in the report is 32,943,203. This total includes 17,536 gallons sold and delivered to Post Exchanges. These sales are exempt from taxation by the State of California [fol. 6] and are included in this report only at the insistence of the State Board of Equalization which asserts that these sales are taxable and joins with you in demanding payment of the tax.

We protest against the assessment, levy, collection and payment of the tax with respect to the 17,536 gallons claimed to be exempt, because:

1. Said motor vehicle fuel was sold to the United States government or a department thereof for official use of said government and is therefore exempt from the tax by virtue of an express provision in Section 10 of the Motor Vehicle Fuel License Tax Act.

2. The sale of said motor vehicle fuel is immune from taxation by the State of California under the provisions of the Constitution of the United States.

3. As construed by you and the State Board of Equalization, the State Motor Vehicle Fuel License Tax Act under which this tax is alleged to be imposed is unconstitutional because it imposes upon the United States a burden prohibited by the Constitution of the United States and deprives the undersigned of property without due process of law in violation of Section 1, amendment 14 of said Constitution.

Therefore the undersigned hereby protests against the payment of the said tax assessed for the month of March, 1941, in the sum of $526.08, and herewith pays said sum to you under and subject to the foregoing protest.

Yours very truly, Standard Oil Company of California, by A. K. Stevenson, Assistant Secretary.

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

A. K. Stevenson, being first duly sworn deposes and says: He is an officer, to wit, an Assistant Secretary of the

[fol. 7] Standard Oil Company of California, a corporation, and makes this verification for and on behalf of said corporation; he has read the foregoing protest and knows the contents thereof and the same is true of his own knowledge except as to matters therein stated on information or belief and as to those matters he believes is to be true.

A. K. Stevenson.

Subscribed and sworn to before me this 24th day of April, 1941. Frank L. Owen, Notary Public. (Seal.)

In and for the City and County of San Francisco, State of California

Received this day from Standard Oil Company of California, a corporation, a protest against the assessment, levy, collection and payment of taxes by said corporation in the sum of $526.08, on account of certain sales made to the United States Government, of which protest the foregoing is a duplicate.

Harry B. Riley, State Comptroller, by Bert Foster, Deputy Comptroller."

Date April 30, 1941, Sacramento, California.

VI

Attached hereto and marked Exhibit A is a true copy of Army Regulations No. 210-65 issued by the War Department on June 29, 1929, together with copies of amending and supplementary regulations thereto, marked Exhibits B to H, inclusive, as they appear in Army Regulations 210-65, C 3 and War Department Circulars issued by the War Department from time to time, subsequent to June 29, 1929, as indicated thereon. Said Exhibits A to H, inclusive, are hereby incorporated herein as fully as though set forth [fol. 8] at length herein. The post exchanges referred to in paragraph IV hereof were organized and owned and have since operated entirely in accordance with and under and by virtue of said Army Regulations.

VII

Said sales of gasoline to United States Army post exchanges are not subject to the motor vehicle fuel license

tax because such sales were of motor vehicle fuel sold to the Government of the United States, or a department thereof, for official use of said government and are, therefore specifically exempted from the tax by section 10 of the Motor Vehicle Fuel License Tax Act.

VIII

Said sales of gasoline to United States Army post exchanges are not subject to the motor vehicle fuel license tax because such sales were made to instrumentalities and agencies of the United States. If said Motor Vehicle Fuel License Tax Act properly construed and applied purports to impose a tax upon sales to the United States Army post exchanges said act is unconstitutional and void in that it imposes a burden upon instrumentalities and agencies of the United States prohibited by the Constitution of the United States and subjects instrumentalities and agencies of the United States to regulation beyond the power of the State of California to impose.

[fol. 9] IX

Neither the whole nor any part of said amount paid under protest has been repaid or refunded to plaintiff. Said amount of $526.08, together with interest thereon as provided by law is and remains wholly due, unpaid and owing from defendant in his official capacity to this plaintiff.

Wherefore, plaintiff prays judgment against defendant as Treasurer of the State of California in the sum of five hundred twenty-six and eight hundredths dollars ($526.08), with interest thereon as provided by law.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[fol. 10] *Duly sworn to by A. K. Stevenson. Jurat omitted in printing.*

*AR 210-65

[fols. 11-36] EXHIBIT "A" TO COMPLAINT 1

ARMY REGULATIONS
No. 210-65

WAR DEPARTMENT,
WASHINGTON, *June 29, 1929.*

POSTS, CAMPS, AND STATIONS

EXCHANGES

SECTION I

GENERAL

1. Establishment and maintenance.—*a. General.*—At each post, camp, or station the commanding officer will establish and maintain a post exchange whenever—

(1) There is a need for it.

(2) There are organizations present that desire to participate therein.

(3) The personnel is sufficient to profitably maintain and support such an exchange.

Post exchanges are Government instrumentalities. *See Ops. J. A. G., September 25, 1923; Ops. J. A. G., December 2, 1919; Dugan v. United States, 34 Ct. Cls. 458, 468.*

b. Branch exchanges.

(1) *General.*—At large posts, camps, or stations, where more than one exchange store is needed or desirable, the commanding officer may establish and maintain branch exchanges or subexchanges, which will be under the supervision and control of and form a

*This pamphlet supersedes AR 210-65, June 30, 1925 (including Changes No. 2, May 7, 1928), which has been changed as follows:

Paragraphs 3, 5, 6, 17, 27, 32½, 34, 39, 41, 49, 54, and 59½ changed.

Paragraphs 34 and 66 added.

Paragraphs 33 to 76 renumbered.

part of the post exchange. The commanding officer upon the recommendation of the post exchange council will determine the number and location of the branch or subexchanges.

(2) *Normal number.*—At a post, camp, or station where branch exchanges are established and maintained there will be normally one completely stocked branch exchange to each regimental area or the approximate equivalent thereof. In case it is desirable to combine several regimental groups of participants into one branch exchange on account of particular location or other local considerations, the commanding officer may vary the general basis of apportionment of one branch exchange per regiment.

(3) *Subexchanges.*—A subexchange implies a smaller store not completely stocked, of a more or less temporary character, and is usually established for the convenience of the men at street-car terminals, theaters, clubs, or other educational and recreational centers, temporary camp sites, etc., where men congregate and exchange business is justified.

c. *In the field.*—During active operations the commanding officer of troops in the field may authorize exchanges when conditions make it desirable and practicable to do so.

d. *In time of war.*—In time of war, exchanges may be established and maintained, and will continue to function, where practicable, as prescribed in these regulations.

e. *On Army transports.*—The establishment of organization exchanges by troops traveling on Army transports is not authorized.

2. **General authority and responsibility of commanding officer.**—Subject to the general supervision of superior authority, the commanding officer has complete jurisdiction over the conduct of all exchanges within or pertaining to his command. He will be held strictly responsible for their efficient operation and for the enforcement of exchange regulations. After he has approved an appropriation of the post exchange council he will be held responsible for all expenditures pertaining thereto not made in accordance with regulations.

3. **Designation; name in which business transacted.**—a. *Designation.*—The exchange will be designated as the post, camp, company, or detachment exchange accordingly as it pertains to a post, camp, company, or detachment, and will consist of the necessary personnel, offices, warehouses, fixtures, and other property, merchandise stock, a central exchange store (if established—or not as circumstances warrant), and such branch exchanges and subexchanges as may be authorized by the commanding officer.

b. *Name in which business transacted.*—All the business of an exchange will be transacted in the name of the exchange and not in the name of the exchange officer, exchange steward, or other person. All correspondence, orders for merchandise, and other papers will, therefore, be as follows:

THE POST EXCHANGE,
FORT SNELLING, MINN.

[Date] ----------

[Signed] THE POST EXCHANGE,
[Typed] By JOHN DOE,
JOHN DOE,
1st Lt. 28th Inf.,
Exchange Officer.

Signature will be made with pen or, when necessary, with indelible pencil, but never by facsimile.

4. Primary purposes, selling prices.—*a. General.*—The primary purposes of an exchange are—

(1) To supply troops, at the lowest possible prices, with articles of ordinary use, wear, and consumption not supplied by the Government.

(2) To afford to troops means of rational recreation and amusement.

(3) Through exchange profits to provide, when necessary, the means for improving the company messes.

b. Equality of purposes.—The affording of means of rational recreation and amusement will be regarded as of equal importance with the supplying of merchandise to troops at lowest possible prices, and with supplementing organization messes.

c. Interpretation of term "lowest possible prices."—The term "lowest possible prices," as used in *a* (1), is interpreted to mean that to the net invoice price of an article, less discounts, plus transportation and overhead charges, a percentage will be added sufficient to cover the cost of handling, breakage, or deterioration, and to make a small net profit. In this connection post exchanges should be conducted in such a manner as to be of real assistance and convenience to the enlisted men rather than as large profit-making institutions.

5. Activities included.—*a. General.*—An exchange (including each branch exchange) may include, when desirable, the following activities:

(1) A well-stocked general store, including, when deemed desirable by the council and approved by the commanding officer, a meat market, a vegetable market, and a gasoline filling station. Sales to civilians at a filling station will be limited to civilian employees of the post, camp, or station.

(2) *A well-kept restaurant.*—In the restaurant or lunch room prices will be made as low as the cost of the articles, increased by expenses of preparation, pay of the assistants, and normal waste, will permit. Other than this the tariff of prices will be regulated by the circumstances surrounding each exchange.

(3) A barber shop, laundry, tailor shop, and shoe-repair shop.

(4) A gymnasium, possessing also the requisite paraphernalia for outdoor athletics, such as baseball, football, tennis, polo, golf, etc.

(5) Recreation rooms equipped with billiard and pool tables, bowling alleys, and facilities for other proper indoor games.

(6) A library supplied with books and periodicals.

(7) A theater in which moving-picture service, amateur dramatics, and other entertainments may be conducted.

b. Restrictions.

(1) Activities other than those enumerated above will not be added to the business of an exchange without the authority of the War Department; nor will licenses or concessions be granted to private individuals, firms, or corporations to operate any of the exchange activities without such authority. See also paragraph 51*b*.

(2) The use of any device which savors of gambling, such as punch boards, slot machines, etc., is prohibited.

6. Price lists will be posted conspicuously in the various activities of the exchange, or the articles kept for sale will be conspicuously priced so that patrons will not need to inquire as to the price of any article.

6. **Allied recreational activities.**—*a.* In addition to supervising the conduct of the post exchange, the commanding officer is charged with the maintenance of recreational athletics, entertainments, service clubs, libraries, and community cooperation. These activities will be centered, ordinarily, about the post exchange, which may, with the approval of the exchange council and the commanding officer, provide the financial support necessary for their maintenance within the limits prescribed in AR 210-50.

b. Should there be any charge for admission to entertainments run by the post exchange, such charges will be prescribed by the exchange council, subject to the approval of the commanding officer.

7. **Effect of change in membership and management.**—*a.* When all organizations composing the membership of the post exchange are ordered to change station, the business of the post exchange will be settled in full previous to their departure. Should incoming organizations desire to purchase the stock or temporary buildings of outgoing organizations, representatives of the outgoing and incoming organizations will be directed by the commanding officers concerned to equitably decide the amount to be paid for the merchandise in the exchange. Should incoming organizations not desire to purchase merchandise remaining in the exchange the outgoing organizations will make such disposition as directed by the exchange council approved by the commanding officer.

b. Responsibilities for agreements by former management.—All agreements between the post exchange and others will be terminated when the entire membership of the exchange is changed, unless incoming organizations state in writing their acceptance of the agreements, and such agreements are satisfactory to all concerned.

c. All agreements made by post exchanges will contain a statement to the effect that the agreement will be terminated by an entire change in the membership of the exchange.

SECTION II

MEMBERSHIP

8. **General.**—*a. Who may be members.*—The members or stockholders of an exchange, including branch exchanges and subexchanges, will be such companies, troops, batteries, aero squadrons, or other similarly organized units and detachments as have purchased stock in the exchange. The word "detachment" as here used will be understood to mean a number of enlisted men permanently stationed at the post, but who do not belong to any company or similar unit stationed thereat. No detachment of less than three men associated in a mess will be a member, but men of different arms or services who are permanently stationed at the post may be grouped to form a detachment for separate membership as such; or if quartered and messed with an organization stationed at the post such men may be, upon authority of the corps area

commander, attached to the said organization for the purpose of post exchange membership, and the number of shares of post exchange stock purchased by the said organization may be increased accordingly.

b. Extent of membership.—When there is a post exchange with branch or subexchanges, an organization or detachment participating is a member of the main exchange, and will participate in all dividends declared by the post exchange.

c. Membership not obligatory.—Membership in a post exchange is not obligatory. See paragraph 814.

d. Distribution of profits.—When, at the end of each quarter, or oftener if deemed advisable by the council and commanding officer, an exchange is absolutely free from debt a sum sufficient to pay all outstanding bills at any and all times will be taken from the cash on hand and set aside as a reserve fund, and the remainder of the net profits of the exchange for the period specified will be disposed of in the following manner:

(1) Five per cent will be set aside as a fund which will be divided among the members of the exchange proportionately to the authorized enlisted strength for the post, camp or station of the member organizations or detachments. It will be distributed as follows:

(*a*) Where the members belong to regiments the share of such members will be paid into their regimental funds wherever the headquarters of the regiment may be stationed.

(*b*) Where the members belong to independent separate battalions, or similar organizations of whatever arm of service, such portion of their share as is deemed equitable by the council and the commanding officer will be paid to the band or bands serving at the post; and the remainder into the separate battalion, or similar organization, headquarters fund.

(*c*) Where the members belong to organizations having no regimental or independent separate battalion headquarters, their share will be paid to the band or bands serving at the post, if there be any; otherwise to such members.

(*d*) When organizations holding membership in the exchange are temporarily absent the 5 per cent, or the amount set aside, as gained during their absence will be divided among the remaining members of the exchange proportionately to their dividends and distributed as provided for above.

(2) Such sum as the council shall recommend and the commanding officer shall approve will be set aside as a portion of the recreation fund to be disbursed by the recreation officer as prescribed in paragraph 4*f*, AR 210-50. Property purchased with funds so derived will be accounted for as prescribed in paragraph 18*a* (1), AR 210-50.

(3) Such sum as the council, with the approval of the commanding officer, may determine may be appropriated for the benefit of the entire garrison to all or any of the following purposes:

(*a*) Laying out, preparing, and cultivating gardens, and supplying therefor the necessary seeds, roots, or plants.

(b) The purchase of books, newspapers, periodicals, stationery, etc., for the exchange or post library.

(c) The purchase of gymnastic appliances when there is no gymnasium connected with the exchange.

(d) Prizes for athletic sports.

The expenditure of profits for purposes other than these requires the approval of the corps area commander.

(4) The commanding officer is authorized to approve such appropriations to the chaplain's fund from post exchange profits as the exchange council shall from time to time recommend.

(5) The remaining money will be divided among the organizations or detachments contributing to the exchange on such equitable basis as shall be determined by the council with the approval of the commanding officer. Normally the distribution should be made to organizations according to the number of rations drawn by them for the period covered by the distribution. Where differences in this respect arise between the council and commanding officer the decision of the corps area commander will be final. The money thus distributed will be paid into the company or detachment funds. In addition to the dividends for the hospital detachment, the exchange council, with the approval of the commanding officer, shall determine the amount, if any, to be turned over to the surgeon for the sick in the hospital. Donations to a division or brigade headquarters fund, as distinguished from the funds of the headquarters and military police company of the division or of the headquarters and headquarters company of the brigade, are not authorized.

Any variation from these rules requires the sanction of the Secretary of War.

e. Liquidation of shares.

(1) A division of the cash resources after all debts have been paid will also be made whenever the troops, or any part of them, being members of the exchange, change station; in this event no deduction on account of the reserve fund will be made from the share of the withdrawing troops.

(2) The amount of any loss that an exchange may sustain in consequence of the failure of a soldier to pay for articles properly bought on credit, whether by his discharge without sufficient money due on his final statement to pay the debt or by his desertion, will be deducted from the share of the profits of the company or organization to which the defaulter belonged. Losses by fire or other casualty, death of the debtor, depreciation of value of the fixtures, and deterioration of articles kept for sale, and the accidental breakage of fixtures or other property will be borne by all the participating organizations in common, and will be deducted from the gross receipts before dividing the profits. Credit accounts should be treated as bills receivable until they are settled or found to be a loss, but bills receivable should not be included in the gross amount from which profits are resolved. The amount of cash on hand on the dates specified, after setting aside a sum sufficient to pay all debts, constitutes the sum subject to distribution.

9. Application for membership.—The commanding officer of a company or similar unit or detachment desiring membership in a post exchange will make application therefor in writing to the commanding officer. This written application will be forwarded and filed with the exchange records.

10. Admission to new exchange.—*a. Number of shares.*—The total number of shares in an exchange will be the same as the total authorized strength for the post, camp, or station in enlisted men of all organizations participating in the exchange.

b. Amount to be paid.—When an exchange is first established, the exchange council will fix the amount necessary for its establishment. When this amount has been determined, it will be divided by a number equal to the number of shares, the result being the value of one share. The amount to be paid by or to be charged to any company or detachment for its entrance fee or capital stock will be determined by multiplying the value of one share by a number equal to the authorized enlisted strength for the post, camp, or station of the company or detachment seeking admission.

11. Admission to an established exchange.—*a. Appraisal of value of exchange.*—Whenever a company or detachment applies for membership in an exchange already organized, a careful appraisal of the net worth of the exchange will be made by a disinterested officer—preferably a field officer—to be appointed by the commanding officer, who, whenever practicable, will be assisted in the performance of the duty by two officers, one representing the stockholders and one representing the incoming organization. These assistants will be designated by the commanding officers of the organizations concerned. The report of the appraiser will be accompanied by itemized lists of property and merchandise as certified by the exchange officer.

b. Amount to be paid.—The amount to be paid by an incoming organization will be determined by dividing the net worth of the exchange, as determined by the appraisal, by a number equal to the number of shares already owned in the exchange, and multiplying the quotient by the authorized enlisted strength.

c. Increase in number of shares; disposition of amount received.—The number of shares in the exchange will be increased by a number equal to the authorized enlisted strength for the post, camp, or station of the incoming organization. The sum paid into the funds of the exchange, as provided in *b* above, will be regarded the same as funds originally invested and be properly entered on the books of the exchange.

12. Admission on credit.—*a.* A company or detachment joining an exchange when unable to pay in cash may, upon the recommendation of the exchange council approved by the commanding officer, be charged with its entrance assessment, and such charges may be liquidated from the company's or detachment's share of the profits of the exchange when dividends are declared, or upon closing out of the exchange. An organization joining on credit will submit to the exchange council some written evidence of its debt and obligation to pay the amount assessed, and such paper should be carried on the books of the exchange as an "account receivable." It is an asset and should be reduced in value from time to time as the profits are divided.

b. When an organization is admitted on credit, the number of shares will be increased as in paragraph 11*c*.

13. Temporary privileges in exchange.—When an organization is to be only temporarily stationed at the post, camp, or station, membership in the exchange may, upon recommendation of the exchange council, approved by the commanding officer, be denied, and in such case the organization in question may be allowed the privileges of the exchange and then shall be paid not to exceed 10 per cent of the amount spent in the exchange by the members of the organization in lieu of its share of net profits. The exact percentage to be paid will be fixed by the exchange council, subject to the approval of the commanding officer.

14. Withdrawal from exchange.—*a. Upon change of station.*—When organizations are ordered away from a post, camp, or station, and they have an interest in the exchange, their interest therein will be liquidated.

b. General procedure, withdrawal.—When an organization desires to withdraw from an exchange, the procedure will be similar to that for admission to membership prescribed in paragraph 10. The value of its share of the net worth being determined, that sum will be withdrawn from the gross funds of the exchange and paid over to the withdrawing organization. The exchange will turn over to the withdrawing organization any of its enlisted men's notes, and the amount thereof will count as cash payment to the organization. Any amount due but, for lack of available funds, not paid to an organization when retiring from an exchange will be evidenced by a note for the amount, with legal interest, and will be liquidated as other bills, payable out of the first profits accruing to the exchange. The amount so due and unpaid will be carried on the books of the exchange as an "account payable" and be regarded as a liability until paid.

15. In case of complete transfer of an exchange.—See paragraph 7.

SECTION III

PERSONNEL

16. General.—*a. When there are no branch exchanges.*—Under the commanding officer, and subject to the approved recommendations of the exchange council, the following personnel will conduct the operation of an exchange which has no branches:

(1) An exchange officer.
(2) An exchange steward.
(3) Such other assistants as may be necessary and authorized by the exchange council and commanding officer.

b. When there are branch exchanges.—When there is a branch exchange or exchanges, the exchange officer provided for in *a*(1) will be known ordinarily as the post exchange officer, and there will be detailed for each branch exchange an officer who will be assistant to the post exchange officer, a branch exchange steward, and such other assistants as may be necessary and authorized. How-

ever, when the garrison consists of a single regiment, or similar command, or when the branch exchanges are small, the assistant exchange officers may be omitted, the duties being performed by the post exchange officer.

c. Post exchange council.

(1) Post exchange councils are assembled to—

(*a*) Audit the exchange funds.

(*b*) Ascertain and examine the sources from which and methods by which they have accrued.

(*c*) Recommend expenditures and appropriations therefrom.

(2) (*a*) Except as prescribed in (*b*) and (*c*) below, the post exchange council will consist of the post exchange officer and the commanding officers of each company, troop, battery, hospital detachment, or similar organization participating in the profits of the post exchange as members thereof.

(*b*) In posts or camps containing tactical divisions or other large bodies of troops, the post exchange council may, when so ordered, consist of the post exchange officer and the commanding officer or a representative selected by him of each regiment or other separate organization having one or more units participating in the exchange.

(*c*) At a general hospital the council will consist of not less than three members, in addition to the exchange officer. Members in excess of those required by (*a*) above will be appointed by the commanding officer.

(3) The post exchange council may delegate to an executive committee of its own members the performance of such portion of the duties prescribed for the council as the council may decide, but the council retains its responsibility.

(4) In meetings of the post exchange council each member will be entitled to vote on all questions the number of votes equal to the number of shares of stock held by the organization of which he is the representative, and a majority of the number of shares of stock voted will decide the question.

(5) The council may be convened at any time at the call of its president or at the request of the exchange officer or one of its members or by direction of the commanding officer and, subject to the approval of the latter, will—

(*a*) Designate the articles to be kept for sale.

(*b*) Fix the prices at which they will be sold.

(*c*) Authorize and supervise all purchases of supplies.

(*d*) Fix the schedule of charges of the barber shop, laundry, restaurant, cobbler, and the prices charged by company tailors and tradesmen for making and repairing uniforms of enlisted men.

(*e*) Not later than the 15th of each month, meet to—

1. Examine the books of the exchange.

2. Inspect the quality and prices of the articles for sale.

3. See that the exchange regulations are complied with.

A record of the attendance by name will be entered in the council book.

(6) Prior to the meeting of the council the commanding officer will designate one member of the council other than the exchange officer to audit the accounts and records of the exchange. The officer so designated will certify in the exchange council book—

(a) That he has audited all of the accounts and records of the exchange in detail as required by Section VIII,

(b) That the financial condition of the exchange, as shown in the council book is correct,

(c) That the accounts and records were found correct except ---------- (here should be listed all irregularities and deficiencies noted during the audit, including accounts found delinquent), and

(d) That the following results were obtained from verification, under paragraph 64, of the stock record account:

	Selling price	
Inventory, beginning of month	$-------	
Merchandise purchased during month	-------	
Total accountability		$-------
Receipts from sales during month		
Other credits:		
Merchandise returned	-------	
Merchandise condemned	-------	
Merchandise expended	-------	

Inventory, end of month	-------	
Total credits and on hand		-------
Difference		-------

(7) At the end of each month and as provided for in paragraph 17 b (1) (d), a member or members of the council, detailed by the commanding officer, will take a thorough inventory of the stock, cash, and fixtures. The officer or officers so designated will make entry (or will retain one copy of the inventory taken and will check therefrom the posting) in the inventory column of the stock record book of the inventory and the value at both cost and selling prices of each article of stock, together with total values of same at both prices. All inventory data will be carefully guarded by the inventory officer until finally posted and checked by him in permanent form in the inventory column of the stock record book. The inventory officer will certify in the stock record book—

(a) That he has accurately inventoried the stock, cash, and fixtures of the post exchange;

(b) That the record of inventory of the stock, including both its cost and selling values, and that of the fixtures, including their present values, as entered therein, are correct; and

(c) That the actual cash on hand and in bank on ---------- (Date) was $----------

(8) A statement of the result of the monthly investigation and of the accounts of the exchange officer, showing the receipts and expenditures during the month; the assets and liabilities and the value or net worth of the exchange at the end of the month; the increase or decrease in the value of the exchange since last report; the profit or loss in the different departments, etc., constituting this increase or decrease and the percentage of gross profits, all a part of the proceedings, will be entered in the post exchange council book which will be kept at each post and submitted to the commanding officer for his action. Should the post or other commander disapprove the proceedings, and the council, after reconsideration, adhere to its conclusions, a copy of the proceedings will be sent by the commanding officer to the corps area commander, whose decision thereon will be final. The final orders in each case will be entered in the council book. A copy of the statement, with the commanding officer's remarks indorsed thereon, will be exhibited in a conspicuous place in one of the rooms of the exchange during the ensuing month. Any question not involving pecuniary responsibility upon which the exchange council and commanding officer may disagree will be submitted for final decision to the corps area commander.

17. **Exchange officer.**—a. *General.*—The post exchange officer will be carefully selected and will be detailed by the commanding officer. He must be fully in sympathy with the purposes of the exchange and must possess the business qualifications necessary for its success. He will receive no compensation for his services as exchange officer. In large commands he should be a field officer of extended experience.

b. General duties.

(1) *Of exchange officer.*

(a) Under the commanding officer, the post exchange officer is in charge of the post exchange and is responsible for its management. He will prescribe and enforce rules of order. He is responsible for the proper performance of the duty of his assistants. He will in person check their accounts frequently, and will each day check up the steward's daily report. He will be the custodian of the exchange funds, and as such he will himself keep the cashbook and make all entries therein. At a convenient time, which meets with the approval of the commanding officer, prior to closing the exchange each day he will, for safe-keeping over night, place and lock in his office safe all cash and checks except such amount in the exchange steward's possession, not to exceed the amount of his bond (par. 22), as the commanding officer on the recommendation of the council may authorize; and will deposit all except a working balance in a bank at the first opportunity.

(b) No employee of the post exchange or any of its branches will have access to the cash of the exchange after it has been turned over to the post exchange officer, or, in the case of branch exchanges, to any of his commissioned

assistants. Except for small amounts of cash which may be necessary to be kept in the cash registers during the hours of the current day's business for the purpose of making change, and except for cash necessary to be on hand for making change on pay day, all post exchange funds will be kept on deposit in a reputable national or State bank, or trust company other than a private bank, preferably a United States depository which is a member of the Federal Reserve banking system. In case no national bank is reasonably available, a regularly chartered State bank may be used as a depository for post exchange funds. The post exchange officer is responsible for all loss of post exchange funds, where the loss is due to his fault or neglect. Under no circumstances will post exchange funds be taken away from the post where the organizations to which they pertain are stationed, except as may be necessary to pay indebtedness, or for deposit in a bank.

(c) Should the officer who is custodian of the post exchange fund be absent from the post, on leave or otherwise, for a period beyond 3 and less than 10 days, he will leave the funds with the officer acting in his place, taking a memorandum receipt therefor. If an officer is to be absent for more than 10 days, he will regularly transfer to his successor the funds of which he is custodian.

(d) When an exchange officer is relieved, an inventory of all stock, fixtures, notes receivable, credit checks, and coupon books on hand, etc., will be taken and the assets so ascertained to be on hand, together with all the funds, will be transferred to his successor, receipts being taken therefor.

(e) In transferring funds to a successor the accountable officer will make the following certificate, including list of outstanding debts and obligations, in the fund or council book:

"I certify that, to the best of my knowledge and belief, the following is a complete and accurate statement of all outstanding debts and obligations to date, payable from this fund."

In case there are no outstanding debts or obligations, he will certify accordingly.

(f) Post exchange funds deposited in a bank, will be placed under their official designation as, for example, the Post Exchange, Fort Meyer, Va., by—— 1st Lt. 3 Cav. Exchange Officer, and not to the credit of the officer who is custodian.

(2) *In case of large exchanges.*—The post exchange officer will be in charge of all exchanges at the post, camp, or station. Ordinarily he will be in personal charge of the central exchange store, where the office of the post exchange should be located. In general he will—

(a) Manage the central exchange store and all branch and sub-exchanges.

(b) Cause the books and accounts of all branch and subexchanges to be kept at the central exchange store.

(c) Supervise and coordinate the accounting systems of branch and subexchanges in accordance with the accounting system prescribed herein and to insure uniformity.

(d) By authority of the post exchange council, approved by the commanding officer, he will make purchases (par. 51) and settlements for the central exchange store, and for all branch and subexchanges to insure lowest costs.

(e) Under the approved policy of the post exchange council, regulate selling prices in all exchanges with a view to establishing and maintaining a uniform price for the same article.

(3) *Of assistant exchange officers.*—Under the post exchange officer, the duties of an assistant exchange officer are similar to those of an exchange officer. He will be detailed by the commanding officer and will conduct the affairs of his branch exchange in accordance with instructions from the post exchange officer. Ordinarily there will be detailed one assistant exchange officer for each branch exchange. Subexchanges should be placed under the supervision and management of the nearest branch exchange officer; or they may be managed directly by the post exchange officer. In the temporary absence of the post exchange officer, the senior assistant exchange officer will act as post exchange officer, unless otherwise directed by the commanding officer.

18. Exchange steward.—*a. General.*—The exchange officer will be assisted by an exchange steward, generally a noncommissioned officer, but in large exchanges where financial and other considerations fully justify it he may be a civilian. The exchange steward should possess a good knowledge of commercial customs, should be of unquestionable integrity, and of sufficient firmness and strength of character to enforce order and discipline about the premises.

b. General duties.

(1) *General.*—In the temporary absence of the exchange officer the exchange steward will be in immediate control of the exchange and the business thereof when there are no commissioned assistants. Except where a bookkeeper is employed, the steward will keep the records and books of the exchange, under the supervision of the exchange officer. The steward will exercise the necessary supervision over his subordinates, frequently checking their conduct of business. In case the post exchange has branches, there will be a steward for each branch or subexchange. There is no authority for the steward or any other enlisted or civilian subordinate to make purchases for or contract indebtedness against the post exchange. See paragraph 17b(2) (a).

(2) *Daily report.*—The exchange steward will submit to the exchange officer a daily report covering the day's transactions, known as "Steward's Daily Report," showing the following:

(a) 1. Cash received from sales.
2. Cash received on account.
3. Cash expended.
4. Cash ahead or short.
5. Cash-register readings.

(b) 1. Credit checks received from sales.
2. Credit checks outstanding.

These reports, exhibiting the exchange officer's approval, will be placed on file in a conspicuous place in one of the exchange rooms.

19. **Assistants.**—The exchange steward and branch or subexchange stewards will be assisted in the conduct of the business by the necessary assistants. These assistants will ordinarily be enlisted men, but in an exchange where financial and other considerations fully justify it they may be civilians, preference being given to retired enlisted men and honorably discharged soldiers. When enlisted men are detailed for duty in an exchange, they will, as far as practicable, be from organizations participating in the exchange.

20. **Employment of bookkeeper.**—A bookkeeper may be employed by an exchange when such employment is evidently desirable and the financial condition of the exchange entirely justifies this expense.

21. **Prohibition of perquisites.**—No exchange officer or assistant of an exchange, either directly or indirectly, shall have any personal interest in purchases, sales, or profits, or any advantage of wastage or perquisites of any kind whatsoever. Exchange officers and employees will not be permitted to receive gifts or presents of any kind from merchants or individuals having business relations with the post exchange. The acceptance of presents by any person connected with a post exchange is considered incompatible with a proper performance of exchange duties.

22. **Bonding of exchange officers or assistants.**—When desirable an exchange council may, with the approval of the commanding officer, require a bond in a reasonable amount from any exchange officer or assistant, to insure the proper handling of the funds and property intrusted to them. The expense of bonding will be borne by the exchange.

23. **Employment of auditing accountant.**—With the approval of the commanding officer, an exchange council may authorize the employment of an expert accountant at stated intervals to audit the books of the exchange, the expense to be borne by the exchange. In such cases the commanding officer and the post exchange council retain their full responsibility.

24. **Committees of noncommissioned officers.**—a. *Composition.*

(1) *Where there are no branch exchanges.*—For each exchange having no branches, there will be a committee of noncommissioned officers, consisting of one noncommissioned officer from each organization and detachment participating in the exchange, and known as the "Exchange Committee of Noncommissioned Officers."

(2) *When there are branch exchanges.*

(a) *For the post exchange.*—For each post exchange with branches there will be a committee of noncommissioned officers consisting of one noncommissioned officer selected by the commanding officer to represent each branch exchange.

(b) *For each branch exchange.*—For each branch exchange there will be a committee of noncommissioned officers consisting of one noncommissioned officer from each company and detachment within the branch exchange area.

b. *Meetings; duties.*—The exchange committee of noncommissioned officers will be convened by the commanding officer not less than four times a year. The committee will submit to the post exchange council its views, orally or in writing, in respect of the immediate internal operations of the exchange, and it will recommend any changes that may be desired by the enlisted men. Its views and recommendations will be carefully considered by the council, whose action thereon will be reviewed by the commanding officer. Recommendations approved by the commanding officer will be put in effect at once.

SECTION IV

MANAGEMENT

25. General.—The following suggestions, based upon the systems which have been found most satisfactory by experienced exchange officers, are published for the information of all concerned:

a. *Scheme for keeping account of stock.*

(1) All stores not in salesroom to be kept in storeroom under lock and key and a competent employee detailed as storekeeper. He should receive all stores of whatever nature coming into the exchange and issue the stores to the several departments on requisitions in writing approved by the exchange officer or the steward. (Form A.)

(2) If stores in one department are needed in another they should be turned in to the storekeeper on approved "Turn in" card (Form B) and issued on approved requisition. Damaged or spoiled stores should be entered on a "Damage Report" (Form C), which, after approval by the exchange officer or steward, should be turned over with the stores to the storekeeper.

(3) The storekeeper should be provided with a stock record book in which to charge the storeroom with the cost of all stores received and credit it with the cost of all stores issued, charging each department with the cost of stores issued thereto, crediting each department with the cost of all articles sold and the cost of all stores turned in on account of damage or otherwise. (Form D.)

(4) The invoices of stores received together with the approved "Turn in" orders will be the vouchers for the debit entries of the storeroom account. The credit entries will be the approved requisitions. Approved receipted requisitions will be the vouchers for the debit entries against each department; and sales (cost value of articles), "Turn in" orders, and damage reports will be the vouchers for the credit entries.

(5) The balance on hand in the storeroom and in each department, as shown by the stock record, should be equal to the total cost of the articles on hand in each as determined by inventory.

(6) This system does not depend on the names of the individual articles, except as to inventory, but deals only with the total cost values, thus eliminating much detail, but at the same time showing whether or not the stock is being properly accounted for.

(7) There are three checks:

(a) For all articles reported sold the equivalent in cash, checks, or credit must be turned in by the salesman.

(b) Should a salesman report less than he actually sells, he will be short at the end of the month, or at such time as he may be checked up. All shortages will be made good by the salesman.

(c) The storeroom and each department may be checked at any time by taking an inventory, determining the total cost of the articles found to be on hand, and comparing the same with the balances shown by the stock record.

(8) The stock record should be ruled so as to show—

(a) The total cost of articles on hand in the storeroom at the last inventory.

(b) The total cost of articles received into the storeroom since the last inventory, as shown by invoices, transferes from departments, etc.

(c) The total cost of articles on hand in each department at the last inventory.

(d) The total cost of articles issued to each department on approved requisitions.

(e) Cost of articles sold from each department.

(f) Cost of articles turned in from each department.

(g) Cost of stores condemned.

(9) Another method whereby a verification can be made is to calculate the value at the selling prices of all articles on hand at the beginning of the month in each department and to charge it with the total; then charge each department with the selling price of all goods issued to it during the month; the total of the two is the amount for which the department is accountable. Crediting the department with the amount of sales and with the value of goods turned in, damaged or spoiled, and condemned, at the selling prices, gives the amount accounted for. The difference between the two should be the total value of merchandise on hand at selling prices. The verification by the auditing officer required by paragraph 71 is a check against the exchange officer of all stock for which the latter has assumed accountability. For his own protection, the exchange officer should in turn check against each department in accordance with the provisions of this subparagraph in order definitely to fix the responsibility to him for any shortage that may exist, charging such shortage against the responsible salesman or salesmen, as prescribed in (7) above.

b. *Simplifying accounts when exchange is on a cash basis.*—Enter each invoice in a purchase record, as shown in Form E. (A unit-ruled blank may be obtained for this purpose, or an ordinary blank may be ruled as indicated.) When the bill is paid, enter the information as shown. This system is suitable

only when the exchange is on a cash basis. It has the advantage of showing all invoices on the same account. If the invoices are numbered serially and bound in serial order at the end of the month, auditing is facilitated. When this system is used the bill register is unnecessary.

c. Simplifying accounts that are practically cash accounts.—As accounts for merchandise purchased by officers and organizations are required to be settled at the end of the month and are practically cash accounts, the following scheme will reduce clerical work and facilitate auditing:

All charge slips are entered as received, under the name of the purchaser, in a duplicating bill file, consisting of a binder containing sheets with the exchange billhead and blank sheets alternately. The name of the purchaser is first written in the billhead, and then the charges are entered from the charge slips received from day to day, the whole being duplicated on the blank sheet by carbon process. The duplicate should be retained and the original sent out as a bill.

d. Restaurant account.—A separate account should be opened with the restaurant (or lunch counter), as this is a manufacturing department and requires careful supervision to enable it to yield suitable profits. This account should show the quantity and cost of all articles received for the restaurant, cost of labor, and the quantity and total cost of all articles as made up for sale.

e. Account of sales.

(1) Each salesman should be required to keep a record of each sale made by him. This may be kept conveniently on a duplicate sales pad. If the system of keeping account of the stock described herein should be adopted, the salesman should note on the retained slip the cost of each article sold and should enter the total cost of the sale shown by each slip on a tally card in the back of the sales pad. Credit sales must be shown by writing the name of the purchaser at the top of the slip. Cash and check sales will be shown by the absence of the name of the purchaser. Cash slips may be marked + and check slips #, in order to distinguish them. At the close of the day's business the steward should receive from each salesman the tally card showing the total cost of the articles sold, together with the sales slips and a report on a form similar to the following:

Sales Report

Fort _____,

_____, 192

Cash_____

Checks_____

Credit_____

Total_____ _____

_____

In charge.

(This will accompany the steward's report)

(2) The steward should total the slips under each head, compare them with the report, and check the total of all sales as shown. He should also total the cost prices of the articles sold by each salesman as shown by the tally card, and should see that the storekeeper enters the same in the stock record to the credit of the proper department. The steward should also see that the charge slips are entered on the proper accounts of the duplicate bill file, and should then make out his daily report to the exchange officer on a form similar to the following:

STEWARD'S DAILY REPORT

Post Exchange,
Fort.....

RECEIPTS

	Credit	Checks	Cash	Total
Restaurant				
Store				
Recreation rooms				
....., etc.				
Total				

Checks issued, $.....
Received, $.....

.....
Steward.

[Signed] .....
[Typed] *1st Lt.* ——— ———
Exchange Officer.

....., 19..

(3) *Cash registers.*—When practicable, one or more cash registers, purchased from exchange funds, should be used in the exchange. The turn-back keys of cash registers should be in the hands of the exchange officer or assistant exchange officer to enable him to make verification of reports made from the registers.

26. Blank forms.

FORMS

Form A

Requisition

Dep't..... Date.....

Clerk..... O. K.....

Amt.	Article	Cost	Total
	Total....		

Received the above articles.

.....

Check carefully, as you are responsible for this property.

Form B

Turn in

Dep't..... Date.....

Clerk..... O. K.....

Amt.	Article	Cost	Total
	Total....		

.....

Storekeeper.

Make in duplicate and keep one.

NOTE.—This form should be printed in red ink.

Form C

Damage Report

Dep't..... Date.....

Clerk..... O. K.....

Amt.	Article	Cost	Total
	Total....		

.....

Storekeeper.

Make in duplicate and keep one.

NOTE.—This form should be printed in red ink.

Form D

Storekeeper's Stock Record (Par. 25 a (3))

191		Storeroom												Grocery												Notions												Etc.
			Dr.					Cr.						Dr.					Cr.							Dr.					Cr.								
Jan.	1	Inventories	2	5	0	0	00								6	5	0	00								5	0	0	00									
	1	Requisition								6	0	00			6	0	00																					
	1	Sales																		4	0	00										2	5	00				
	2	A. B. & Co. (1)		1	0	0	00																												1	00		
	2	Damage																																				
	2	Turn in				5	00													4	00																
	2	C. D. & Co. (2)			5	0	00																															
		Etc.																																				
		Totals	2	6	5	5	00	0		6	0	00		7	1	0	00			4	5	00		5	0	0	00			2	5	00						
		Balances						2	5	9	5	00							6	6	5	00							4	7	4	00						
								2	6	5	5	00							7	1	0	00							5	0	0	00						

Form B

Purchase Record, Month of January, 192

192			1				2				3				4				5				Discount			Date paid		Amount paid				Discount			Remarks
			Total				Merchandise				Expense				Fixtures				Errors				10	20	60										
Jan.	9	A. B. & Co.	1	5	0	00	1	0	0	00						5	0	00					2			Jan.	10	1	4	7	00			3	00	
	11	C. D. & Co.		7	5	00		5	0	00			1	00		2	0	00			1	25	6			Jan.	12		6	9	25			4	50	

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SECTION V

RECORDS

27. **General.**—*a.* Except as otherwise authorized in paragraph 35, the books named in this section will be kept in each post exchange, in the manner described hereinafter.

b. How accounts kept.

(1) *General.*—The post exchange officer will cause all the accounts of the exchange, including those of branch or subexchanges to be so kept that the status of the exchange or any of its branches can be readily understood at any time and that the information necessary to render the prescribed reports will be readily available.

(2) *Double entry system.*—A double entry system of bookkeeping will be used.

c. Destruction of old records.—All invoices, receipted bills and other books and papers relating to the business of an exchange, except the exchange council book, and pertaining to accounts that have been closed more than six years, may be salvaged as no longer required for the protection of the exchange, except in the case of an exchange where the statute of limitations prescribes a longer period on such accounts, in which case the papers will be kept for such longer period, unless with respect to an entry or omission of an entry therein a civil claim or criminal action shall have been presented or initiated, under which circumstances the destruction of the records concerned will be postponed until after disposition of the claim or criminal action. Under the direction of the commanding officer, the papers specified will be salvaged by the exchange officer who will record the action in the exchange council book.

d. When exchange abandoned.—In the event of the abandonment of a post, the post exchange council book, together with all records not salvaged as above provided, will be forwarded to The Adjutant General.

28. **Cashbook.**—*a.* In the cashbook will be entered each day's transactions, cash received being entered on the left hand, or debit side, and cash paid out on the right hand, or credit side. The date, explanation of the entry, and the amount of the transaction will be entered on a separate line for each transaction. In large post exchanges, where it is necessary to keep a record of receipts and expenditures by departments, such as store, lunch room, meat market, etc., separate columns will be provided for debit and credit entries under each such department.

b. Vouchers.—Each disbursement entry in the cashbook will be supported by an itemized voucher properly receipted by or for the party with whom the transaction was effected. Similarly each entry therein showing a cash receipt, other than one required by paragraph 18 *b* (2) to be shown on the "Steward's Daily Report," will be supported by an itemized voucher (invoice

of funds) properly signed by or for the party with whom the transaction was effected. All other entries showing cash receipts will be supported by the exchange steward's daily reports, which will constitute the remaining debit vouchers. Each set of vouchers (receipts and disbursements) will be serially numbered beginning with No. 1 for the first entry of each month. Each voucher to which an invoice pertains will, in addition to the notations required by paragraphs 32 and 33 to be placed on such invoices, bear the statement that the voucher is correct and just. (See par. 68 *d*.)

A paid check bearing across the extreme left end of the reverse side thereof, and immediately above where the first indorsement thereon will appear, the notation, "Payment acknowledged on our invoice No. _____, dated _____ (blank spaces to be filled in), together with the invoice or invoices pertaining thereto, may be used as a voucher. A paid check without such notation will not be used as a voucher unless accompanied by a certificate of the exchange officer showing definitely the reason why a properly signed and itemized voucher could not be obtained and also showing by items the exact articles purchased and the cost of each. When it is not practicable to obtain a receipted or signed voucher, the sufficiency of the voucher as certified will be determined and indorsed thereon by the exchange council.

29. Journal.—The journal will be used to prepare transactions for posting to the ledger. It will show by debit and credit items such original entries affecting the business of the exchange as are not posted from the cashbook or other books of original entry.

30. Ledger.—*a. General.*—In the ledger will be entered under separate accounts all debit and credit transactions affecting the business of the exchange, so as to show the amounts due to or from the exchange on each account. The entries under each account will be made from the totals shown in the columns in the cashbook provided therefor, as stated in instructions with reference to the cashbook, or from the journal, if such columns are not provided.

b. Heads under which accounts kept.—In the ledger, accounts will be kept under the following heads:

(1) *Post exchange.*—To show the value of the exchange. This account will be debited with any increase and credited with any decrease in the worth of the exchange.

(2) *Merchandise.*—To show on the debit side the cost of merchandise purchased and on the credit side the amount received for merchandise sold. This account will, at the beginning of each month, be debited with the value at cost price of the merchandise then on hand as per inventory, and will during the month be debited with the cost of all merchandise purchased during that month. It will be credited during the month with all sales of merchandise, and at the end of the month with the value at cost price of all merchandise then on hand as per inventory. The difference between the amounts shown in the debit and credit columns will be the profit or loss for the month. In large exchanges, when it is desired to keep a record of profit and loss by departments, the merchandise account may be kept by departments.

(3) *Bills receivable (enlisted men).*—To show the value of checks or coupons issued to enlisted men, and the amount of cash received

from them in payment of their bills. This account will be debited with all notes given by enlisted men for checks or coupons and credited with all amounts received in payment thereof. The difference will be the amount of notes unpaid.

(4) *Bills receivable (notes).*—To show the amount of notes given by organizations in part payment of purchase money or for other purposes, also the amount of payments thereon and credits from dividends. This account should be debited with all notes received and credited with payments thereof and dividend credits if payments have not been made.

(5) *Bills receivable (credit sales.)*—An account with each person, firm, or organization having any credit transactions with the exchange. This account will be debited with all credit sales and credited with all amounts received in payment therefor. In large exchanges, instead of keeping the accounts individually in the ledger, such accounts may be kept individually in the credit sales book, and at the end of the month or period the total debit and credit entries posted in the ledger. In individual credit accounts of this kind many up-to-date business houses, practically all banks, and some post exchanges have installed automatic bookkeeping machines wherein a loose-leaf ledger and statement system is used. This does away with journal entries and greatly simplifies accounting. Loose leaf statements are printed off directly from the daily credit slips and the account is always balanced to date. At the end of the month it is necessary only to withdraw the original statement which serves as the monthly bill to the customer. The carbon copy is retained and appropriate entry made thereon when the account is paid. In posting ledgers from the statements the automatic machine selects the proper columns for entries, automatically prints dates, adds debits, subtracts credits, and extends and proves a balance with each posting.

(6) *Credit check account.*—To show the amount of coupons issued, coupon sales, and coupons outstanding. This account will be debited with coupon sales and credited with coupons issued. The difference between the debit and credit entries will be the amount of coupons outstanding. If columns are provided therefor in the cashbook, total debit and credit entries at the end of the month or period may be made.

(7) *Bills payable.*—An account will be kept with each person or firm from whom merchandise is bought. Credit the account with all purchases made and debit the account with all payments made on account thereof. As stated above, in large exchanges, instead of keeping the accounts individually in the ledger, such accounts may be kept individually in the purchase-account book and, at the end of the month or period, the total debit and credit entries posted in the ledger.

(8) *Expense account.*—To show the cost of all expenses, such as wages, freight and express, fuel and lights, printing and stationery, telegraph and telephone, insurance, expendable supplies,

or any other expense attendant upon the business of the exchange. This account will be debited with all payments made on account of expenses as shown on the cashbook. Payments of expense may be subdivided, not only in this account but also in the ledger. Transportation should not be charged to operating expenses, but should be added to the cost of the merchandise or fixtures to which it pertains.

(9) *Dividend account.*—To show amount of dividends declared by the exchange council. When a dividend is declared the post exchange account is debited with the amount of the dividend declared and the dividend account credited. When the dividend is paid the dividend account is debited and the cash credited.

(10) *Buildings and fixtures account.*—To show all amounts expended for the betterment of the exchange property and depreciation of value of fixtures. This account will be debited with all expenditures for betterment, repairs, etc., and credited with all depreciation and all receipts obtained from sale of any articles pertaining thereto. Supporting this account is the list of exchange property available as an asset, kept in the stock record book (par. 31).

(11) *Profit and loss account.*—Into the profit and loss account are closed all accounts showing a profit or loss. It is debited for losses and credited for profits or gains. The difference between the two sides will show the net profit or loss and will be transferred to the post exchange account.

31. **Stock record book.**—*a.* The stock record book will be suitably ruled for and will show under their proper nomenclature all articles of merchandise on hand at the beginning of each month as shown by inventory, and all articles of merchandise received, sold, returned, condemned, and expended during the month. This book will also be suitably ruled for and will show the values at cost prices of all articles of merchandise on hand at beginning of month, for use in the "Merchandise account" (par. 30 *b* (2)), and, in separate columns, the values at selling prices of same and of all articles received, sold, returned, condemned, and expended during the month, for use in the audit (par. 70). If, in the opinion of the council, it is desirable that certain articles be sold in quantities at reduced prices, the stock record account will, in order to enable a proper audit to be made under paragraph 70, show the quantities to be sold at such prices as though they were different brands. For example, if it is desired to sell a certain brand of cigars at 10 cents each, two for 15 cents, or a box for $3, the stock record account will show so many "cigars (brand), singles," at 10 cents, so many "cigars (brand), twos" (or pairs), at 15 cents, and so many "cigars (brand), boxes," at $3. In order to prevent an unnecessary accumulation of stock, such quantities may be transferred from one such group to another by making proper adjustments.

b. In a suitable place in the stock record book there will also be entered a list of all exchange property available as an asset, such as buildings and fixtures, showing date of construction or purchase, quantity, original cost, and depreciation from time to time. The total money value of such property as shown in this list must always agree with the value of same as shown by the "building and fixtures account" in the ledger.

c. There will also be entered in a suitable place in the stock record book a record of the coupons received and issued by the post exchange officer, as

required by paragraph 44. This record will show in one column all the coupons received, whether authenticated or not, and in another column all those issued by him, so that at any time it can be determined how many coupons should be in the possession of the post exchange officer.

32. Bill register.—The exchange officer will personally enter in a blank book, suitably ruled and labeled "Bill Register," a memorandum of every invoice, including the name of the firm from whom received, immediately upon receipt of the same, noting on the invoice "B. R. _____," to show page of entry. Date of receipt of the corresponding merchandise will be noted both on the invoice and opposite the proper entry in the bill register, and when the bill has been paid notation to that effect will be made both on the invoice and opposite the proper entry in the bill register. The outstanding liabilities on account of merchandise purchased, as contained in the financial statement of the exchange recorded in the council book, should agree with the total of all bills not marked "Paid" in the bill register.

33. Invoice file.—An invoice file book or file case will be kept. After entry in the bill register, an invoice will be placed in a temporary file labeled "Invoice File, Mdse. NOT Received," and will be kept therein until the corresponding merchandise shall have been received. Upon receipt of the merchandise it will be checked as to quantity, quality, and prices, against the invoice, which will then be placed in another temporary file labeled "Invoice File, Mdse. Received." From time to time the invoices in the latter file will be entered in the proper books and the place of entry noted on each invoice, after which they will be placed in the permanent file, properly labeled. When the bills are paid, the serial numbers of the checks used in payment thereof will be noted on the corresponding invoices, which, if used as vouchers to the cash book, will then be placed in the voucher file. If not so used, they will then remain in the permanent invoice file as supporting papers to the vouchers and will be so arranged that they may be readily located for use in connection with such vouchers during audits and inspections of the cash book.

34. Incoming mail.—*a.* The exchange officer will make effective arrangements to insure the receipt by him in person of all incoming mail for the exchange. Local conditions vary so greatly that the method adopted must be determined locally, but the exchange officer will be held personally responsible for the effectiveness thereof. Suggested methods are a post-office lock box or a locked mail pouch.

b. The exchange officer will either personally open all incoming mail or require it to be opened in his presence.

35. Other books and records.—Such other books and records as are deemed necessary to show stock on hand and value of exchange will be kept in the post exchange by the exchange officer or under his personal supervision.

SECTION VI

CREDIT

36. Granting of credit to enlisted men, general.—*a.* Upon the recommendation of the council, approved by the commanding officer, credit may be given at an exchange to any soldier upon the recommendation of the company or detachment commander, to an amount not exceeding in any one month one-third of his month's pay, except that a noncommissioned officer of the first, second, or third grade may be allowed a credit account in an amount not exceeding in any one month the amount of his unencumbered pay for that month. Credit will not ordinarily be extended to a soldier between the date of last payment on rolls before discharge and the date of discharge. It will be given upon the request of the soldier, in writing. Soldiers granted credit will be distinctly informed that it is their duty to make prompt and unsolicited payment to the exchange officer on the next pay day. Defaulters will be debarred the privileges of the exchange.

b. No credit will be extended to enlisted men between the date of last payment, either full or partial, and the date of departure from the corps area when such credit would necessitate the entering of a charge on W. D., A. G. O. Form No. 24 (Service Record), for collection upon reaching the foreign service station, or the station in the United States, as the case may be.

c. Credit will not be extended to an enlisted man at a discharge and replacement depot or at a place of concentration until receipt of his service record thereat.

37. Use of credit checks, general; restrictions.—*a. Authority, how designated.*—The use of checks or coupons representing values and exchangeable for merchandise or other charges at an exchange is authorized. Such checks or coupons will be designated as "credit checks" or "credit coupons."

b. Restrictions.—Care will be taken that credit checks and coupons are not disposed of to unauthorized persons, and to provide against this, they will be redeemed in cash only when received from an activity authorized by the commanding officer to accept credit checks and coupons in lieu of cash.

38. Use of metal credit checks not favored.—The use of metal credit checks is undesirable for obvious reasons. The paper coupon-book system is the safest and most generally satisfactory. Although the first cost is greater than in the metal-check or punch-card system, the coupon-book system is usually economical in the end.

39. Use of coupon books.—The coupon-book system of extending credit to enlisted men will be used by all exchanges conducted at posts, camps, or stations where more than two organizations are stationed, except at tem-

porary stations and at places where conditions of service have made it impracticable to procure the coupon books. These coupon books will show the organization to which the enlisted man belongs and bear the name of the enlisted man to whom issued, and will be honored at the exchange only when presented by the enlisted man whose name appears on the book, except in the cases of those sick in hospital who are authorized to turn over the necessary credit slips to a chaplain, Red Cross representative or a surgeon to make and deliver purchases for them.

40. Requests for credit and action thereon.—a. The following form for requests for credit is convenient:

Company "....," "....." Infantry.

We request credit at the exchange during the month of ....., 192 , to an amount not exceeding that set opposite our respective names.

Fort .....

....., 192....

Names (In the order in which they appear on pay roll)	Credit approved	Credit given	Signature of soldier

Approved: .....

Captain ..... *Infantry*

Commanding Company .....

The foregoing form, duly completed, will be the authority upon which the exchange officer will extend credit. This form will usually be in the hands of the steward, or the assistant charged with issuing credit checks, to whom the men will apply for checks or coupon books. In large garrisons men unknown at the exchange will be identified before checks are issued. Upon applying to the steward or other proper assistant, each man will inform him of the number of checks or value of coupon book desired. This may be for the entire amount of authorized credit or for any less amount. The steward or employee will then make out a note in substantially the following form:

....., 192....	Fort ....., 192....
Name	I, ..., promise to pay to the Post Exchange, Fort ....., after my next payment ..... /100 dollars, for value received.
Grade, etc.	$.....
Amount, $.....	Signature ..... (When checks are issued)
	Grade, etc. .....
	Witness: ....., *Steward.*

This note will then be signed and witnessed as indicated, after which credit checks equal in value to the amount signed for will be issued, and the amount will be noted opposite the name of the man on the company list. The correctness of the entry will be authenticated by the initials of the person making such entry on the company or detached list. By this means a man may obtain credit for any amount less than that authorized and subsequently may obtain the remainder, or any part of it, in a similar manner. The man's note received in return for credit checks will be the steward's voucher for the issue. A company commander may send such supplementary lists as he may desire, and at any time during the month may request a modification of the lists pertaining to his company. One great advantage of this system is that soldier may get any part of the authorized credit at any time within exchange hours during the month by applying directly to the exchange officer or steward.

b. An alternative method of regulation credit sales is as follows (notes of the following form are kept on hand by the organization commander):

....., 192....	Fort ....., 192....
Name	I, ..., promise to pay to the Post Exchange, Fort ....., after my next payment ..... /100 dollars, for value received.
Grade, etc.	$.....
Amount $.....	Signature ..... (When checks are issued)
	Grade, etc. .....
	Witnesses:
	..... First sergeant company
	.....
	..... Commanding company
	.....

Upon the presentation of such a note at the exchange, credit checks for an equal amount will be issued to the soldier who will receipt therefor. Stubs will remain in possession of the organization commander, who thus knows the state of the man's credit at all times without reference of the matter to the exchange.

41. Payment of notes due.—*a. At pay table.*—Before payment of the command the notes of each organization will be arranged in the order in which names appear on the pay roll. When more than one note has been given by the same soldier they will be pinned together and the total marked with colored pencil on the top note. These notes, in connection with the list or lists showing the credit given to the men of each organization, give all information needed for the collection. The exchange officer will be present at the place of payment to receive the men's payments on their notes or, in case of large commands, he may make, with the approval of the commanding officer, such other arrange-

ments as will facilitate the payment. A noncommissioned officer of each organization will be detailed to report to the exchange officer at the pay table to identify the men. See also paragraph 1c, AR 35-2320.

b. When overdue, or due from soldier about to be discharged.—When the debt has remained unpaid for one pay day on which the soldier was paid a balance sufficient to discharge such debt, the note covering same will be turned over to the soldier's organization or detachment commander, and the amount of the note debited against the account of the organization for collection from the first dividends due that organization. The soldier's note then becomes a debit due the company fund and will be entered on the next pay roll of the organization as "Due Company Fund." In case of discharge of a soldier the amount of any such indebtedness will be noted on the final statement as due the post exchange or company fund and will be deducted from payment made thereon. On making such a deduction the paying officer will turn over the amount collected to the post exchange officer, or the organization commander, who will receipt to the paying officer and the soldier for the amount so received.

c. When due from deceased soldier.—The amount due an exchange by a deceased soldier is a debt, and constitutes a proper claim against his estate, and may be legally deducted from the pay and allowances due the same. Exchanges having claims against a deceased soldier will file them directly with the General Accounting Office, Military Division, Washington, D. C.

d. Desertion or dishonorable discharge.—Indebtedness of deserters and soldiers sentenced to dishonorable discharge is paid at the time payment is made by disbursing officers, to the extent of credits available therefor, on supplemental pay rolls required by paragraph 5*d* (3), AR 354-155, and claims will not be submitted to the General Accounting Office in such cases.

42. Stoppages against enlisted men.—Debts due an exchange can be collected from any balance due the soldier only after stoppages for debts due the United States have been satisfied. Travel pay due a soldier on discharge can not be stopped to satisfy a debt due an exchange. Where it clearly appears that a soldier is indebted to an exchange, such exchange may be reimbursed the amount of such indebtedness from the amount of pay and allowances reserved by section 4818, Revised Statutes, from stoppages and fines adjudicated by sentence of courts-martial for the reimbursement of the Government and of individuals. In case of a deserter (as well as in case of a discharged or deceased soldier) who is known to be justly indebted to an exchange, a stoppage not exceeding the amount of credit authorized in the regulations may be lawfully made in favor of the exchange.

43. Distribution of losses.—*a. In case of failure of soldier to pay obligation.*—The amount of any loss that an exchange may sustain in consequence of the failure of a soldier to pay for anything bought on authorized credit, whether by his discharge without sufficient money due on his final statements or by his desertion, or otherwise, will be charged against the membership account of the company or detachment to which the man belongs. On the next distribution of profits, the man's notes will be turned over to the company or detachment commander as part payment on the company's or detachment's share of the dividend.

b. In case of fire, etc.—Losses by fire or other casualty, worthless accounts, except those of soldiers referred to in *a* above and in paragraph 8*e*, depreciation of value of fixtures, deterioration of articles kept for sale, and the accidental

breakage of fixtures or other property will be borne in common by all the participating organizations.

44. **Responsibility for credit checks.**—Credit checks or coupons are, when properly authenticated, as valuable as cash. The exchange officer, on taking charge of an exchange, will verify the amount of credit checks or coupons turned over to him, and thereafter will carefully keep an account of receipts and issues. When metal credit checks or paper coupon credit checks are used they will be carefully accounted for by both the exchange officer and the exchange steward. The former will keep an accurate account of the value of both of those turned over by him to the steward for issue and those issued by the steward as shown by his daily report. The balance of credit checks or coupons outstanding will be regarded as a liability until redeemed. The steward will charge himself in his account with the value of all credit checks or coupons turned over to him by the exchange officer, and will credit himself with the value of those issued by him. All credit checks or coupons received from sales will be turned in to the exchange officer with the steward's daily report and their total value thereon verified by the exchange officer. All paper coupons so turned in will be destroyed by the exchange officer in person, preferably by burning. The stewards credit check account need not show the value of the credit checks or coupons outstanding, as this may at once be determined by balancing the credit check or coupon account of the exchange officer.

45. **Credit accounts.**—*a. How carried.*—Credit accounts are carried as bills receivable until they are settled or found to be a loss.

b. Action when overdue.—Monthly credit accounts of officers and others remaining unpaid on the 10th of the month following that for which they are rendered will be reported by the exchange officer to the commanding officer with a view to having the accounts settled.

SECTION VII

MISCELLANEOUS

46. **Government funds for post exchanges.**—Buildings have been constructed and recreational activities set up at posts, camps, and stations, and both main-

tained from funds made available by the War Department. The amount of funds so made available is normally dependent on the amount included in the item, "Military Post Exchanges," in the appropriation act for the fiscal year. The language of the item generally includes the following:

> For continuing the construction, equipment, and maintenance of suitable buildings at military posts and stations for the conduct of the post exchange, school, library, reading, lunch, amusement rooms, for the conduct and maintenance of hostess houses, chapels, and gymnasium, including repairs to buildings erected at private cost, in the operation of the act approved May 31, 1902, for the rental of films, purchase of slides, supplies for and making repairs to moving-picture outfits and for similar and other recreational purposes at training and mobilization camps now established, or which may be hereafter established, * * *. *Act June 30, 1921 (42 Stat. 83).*

47. Local provision for exchange building.—*a.* At posts where exchange buildings have not been provided from funds made available under the provisions of paragraph 46, the commanding officer will set apart for the use of the post exchange any suitable public building or rooms available, or with the approval of the War Department he may authorize the renting of any private building or part thereof on the reservation, the rental to be paid from the funds of the exchange, or, when sufficient post exchange funds are available and are so appropriated by the exchange council, the commanding officer may authorize a suitable temporary building to be erected for the purpose. When a temporary building is constructed wholly or in part by the labor of troops for the use of an exchange, the commanding officer is authorized to use the necessary teams and such tools, windows, sash, doors, and other material as may be on hand and can be spared by the Quartermaster Corps; but no permanent structure will be erected on a reservation without first obtaining the authority of the Secretary of War. When governmental assistance is not rendered, the cost of post exchange buildings and their maintenance will be paid from post exchange funds.

b. When troops who have established a temporary building for a post exchange from post exchange funds are transferred to another post, incoming organizations using the building thus established will pay an equitable sum for its use, but in no case a total sum greater than the cost of construction.

48. Funds for establishing.—*a.* The expense of fitting up the quarters of an exchange and procuring the necessary articles for the first stock and fixtures will be met by assessment from the funds of the several organizations which make up the membership of the exchange, or these will be contracted for, or procured on credit. When procured on credit, the bills will be paid from the first profits. The post exchange is responsible for the debt, and not the Government. This will be made perfectly clear to those extending credit.

b. The funds for the establishment of exchanges in the field will be drawn from the funds of participating organizations. Such funds will normally originate in large part from the liquidation of interests in exchanges at the home station of such organizations. A reasonable proportion of the funds of organizations will, therefore, be held available for the establishment of field exchanges. The sum thus held will normally be not less than one dollar ($1) for each man of the authorized strength of the organization.

49. Services for Government, prohibited.—The practice of obtaining occasional services for the Government from post exchanges, post laundries, and

other quasi public agencies that are established and maintained at military posts by the authority of the War Department, is authorized only in cases in which services of the same class can not be as conveniently or reasonably obtained elsewhere and where a direct advantage will accrue to the Government from the method resorted to. In no case will a post exchange or post laundry be permitted to enter into public competition or to submit bids in response to advertisements calling for proposals for furnishing supplies or services. When accounts are submitted for purchases of the kind described above the vouchers will contain a full statement of the grounds upon which the purchase of supplies or the procurement of services was based and will fully set forth all the circumstances of the transaction, with a view to enabling the proper bureau of the War Department and the General Accounting Office to determine whether the purchase was in the public interest. Public funds received for such services will be taken up in the accounts of the post exchange or post laundry and will be accounted for in the manner prescribed for such accounting.

50. Sale of beer, wine, or intoxicating liquors.—The sale of, or dealing in, beer, wine, or any intoxicating liquors by any person in any post exchange or canteen or Army transport, or upon any premises used for military purposes by the United States, is prohibited. Commanding officers will carry the provisions of this paragraph into full force and effect, and will be held strictly responsible that no exceptions or evasions are permitted within their respective jurisdictions.

51. Purchases.—*a. For the exchange.*

(1) Except as authorized by (2) below, all purchases of merchandise or other property for the exchange will be made by the exchange officer, who will notify all firms and individuals from whom such purchases are made that the exchange will not be liable for the payment of any bills for such merchandise or other property purchased by any other than the exchange officer in person, and that the original invoices pertaining to any such purchases must be mailed direct to the exchange officer.

(2) Exceptions to the requirements of (1) above will be made only when it is impracticable for the exchange officer to make advantageous purchases in person, e. g., from a traveling salesman who habitually visits the exchange during the absence of the exchange officer at drill or other duty, in which case purchases in limited quantities may be made by the exchange steward if authorized to do so by the exchange officer, with the approval of the exchange council and the commanding officer.

(3) Purchases made verbally by the exchange officer and those made in exceptional cases under (2) above will be confirmed in writing by the exchange officer as soon as practicable after such purchases are made.

b. For concessionaires.

(1) Merchandise needed by concessionaires in the operation of their concessions will not ordinarily be purchased for them by the exchange, but if deemed desirable to do so for any special reason the merchandise may be purchased by the exchange on its own account and then sold to the concessionaire.

(2) A concessionaire is in no sense an agent of the exchange and should not be permitted to represent himself as such to the public, e. g., by the use of the words "Post Exchange" on letter or bill heads or on signs.

(3) Commanding officers will exercise such supervision of the activities of concessionaires as will prevent the exchange from becoming involved in any controversy as to its responsibility or liability for debts contracted by concessionaires.

c. In considerable quantities.—When it is desired to buy articles in considerable quantities, the exchange officer will first obtain the approval of the exchange council.

d. Delivery and accounting for.—All goods purchased on account of an exchange will be delivered to it and properly accounted for on its books.

e. Contracts.—Contracts for supplies or merchandise once entered into between the post exchange and civilians will not be canceled except by mutual consent or in accordance with a provision of the contract. Whenever contracts or agreements for purchases are made by a post exchange which by reason of change of station of the organizations holding membership therein or other cause are changed, new contracts or agreements by their successors must be made if desired. All contracts or agreements entered into by post exchanges will contain a provision that in case it is necessary to close the exchange by reason of a change of station or otherwise all contracts or agreements entered into shall be canceled.

f. Articles obtained from the Quartermaster Corps.

(1) Commanding officers will regulate the purchase and resale of articles obtained from the Quartermaster Corps. The quartermaster is authorized to sell to the exchange at cost any subsistence stores except exceptional articles (AR 30-2200). In reselling such goods in their original forms no profit will be made by the exchange beyond the fractions of cents necessary to make change, and no such articles will be sold to civilians not authorized to purchase subsistence stores under the provisions of paragraph 2*a* (2) (*j*), AR 30-2290.

(2) A post exchange may purchase, upon the certificate of the officer in charge that they are for sale only to enlisted men of his post, in such quantities as are needed by them, the following articles of uniform clothing:

Belts, waist.	Laces (all kinds).
Chevrons (all kinds).	Leggings, canvas.
Cords:	Insignia, cap and collar.
Hat.	Stockings.
Tying, for service hats.	

Selling (except by the post exchanges) or bartering these articles purchased or drawn from the Quartermaster Corps is forbidden.

g. Federally inspected meat and meat food products.—See paragraph 4, AR 40-2150.

52. Advice by finance officers.—Locally available officers of the Finance Department may be consulted, and when so consulted will give advice on the financial conduct of post exchanges.

53. **Copy of financial statement to be exhibited.**—A copy of the monthly financial statement (less exhibits), with the commanding officer's action noted thereon, will be exhibited in one of the rooms of the exchange during the ensuing month.

54. **Cashing of final statements.**—*a. General.*—Post exchanges are prohibited from cashing final statements of discharged soldiers unless a finance officer is not readily accessible. No charge will be made for the accommodation, but to insure against loss due to error a part of the value of the final statement will be retained until the account is paid. The amount retained, less the cost of the transaction, will be transmitted to the soldier as soon as the actual state of the account is known.

b. Exchange not liable for overpayment.—An exchange assumes no liability for errors for overpayments to soldiers made by finance officers, the liability resting on the officer who signs the final statements or the finance officer who pays them, according to the source of the error.

55. **Payment for telegraph service.**—The telegraph expenses of a post exchange will be paid by the post exchange as an item pertaining to the cost of maintenance thereof, except that messages on post exchange business over telegraph, radio, and cable lines owned and operated by the War Department may be transmitted without charge, provided that any charges accruing on commercial connecting lines will be paid by the post exchange in whose behalf the message is sent or received.

56. **Responsibility for loss of funds.**—*a.* Post exchanges being agencies of the Government, the duties imposed upon officers in the management of exchange affairs are as binding upon them as any other duty to which they may be assigned under competent military authority and when the property or funds of an exchange are lost through mismanagement or neglect of the exchange officer or any members of the exchange council, or both, the least that can or should be exacted in the public interests is that the exchange officer and any members of the exchange council, responsible therefor, should make good the loss. *See Dig. Ops. J. A. G., 1912–1917, p. 474.*

b. In case of loss of post exchange funds or property the circumstances will be carefully investigated and reported upon by a board of three disinterested officers appointed by the post, camp, coast defense, or station commander. The board making the investigation will include in its report its opinion as to the responsibility for the loss and a recommendation as to appropriate action for the decision of the corps area commander.

57. **Reorganization.**—*a. General.*—Whenever the exchange council, by a majority vote, holds that a reorganization of the exchange is necessary, and that the interests of the exchange can best be subserved by this course, the proceedings of the council in such case, when approved by the commanding officer, will be forwarded to the corps area commander, whose decision thereon will be final.

b. Procedure.—If the proceedings are approved by the corps area commander, all members will withdraw from the exchange at the earliest possible date after the receipt of the approved proceedings at the station and the reorganization will be made effective without unnecessary delay.

58. **Final liquidation.**—When notice is received that an entire garrison of a post, camp, or station is to be withdrawn and the garrison discontinued, the merchandise stock of the post exchange will be reduced to the lowest extent

possible and, as far as may be possible, converted into cash. Prior to the departure of the troops the property of the exchange will be sold and the proceeds distributed by the council among the organizations owning stock therein according to the number of shares held by each. The exchange officer will make a final report of the closing out of the exchange, through military channels, to the corps area commander. Under the above circumstances, the liquidation of an exchange will be as gradual a process as practicable. Prior to all sale of stock at a sacrifice, the personnel of organizations participating in an exchange will be given an opportunity to buy at reduced prices. All stock and fixtures not otherwise disposed of and which can not be carried by outgoing organizations will be disposed of at public sale prior to departure of the final organization concerned in the movement of troops.

59. Government supplies authorized.—*a.* Heating and the issue of suitable apparatus therefor for any room, rooms, or building used by the exchanges is authorized in AR 30-1620, except that this does not include fuel for cooking and all other profit-making activities, the cost of which will be paid for by the exchanges.

b. The Quartermaster Corps will provide supplies for interior and exterior illumination. The necessary lights will be supplied for all public buildings for which illumination is required in order to make proper use of the buildings.

c. Commanding officers may, when necessary, order the issue of the necessary quantity of concentrated lye and Sapolio for buildings heated by the Government and not thus provided for. The use of concentrated lye upon floors and woodwork is forbidden.

60. Repair of unserviceable books.—Valuable books pertaining to a post library which have become unserviceable by fair wear and tear will, when practicable, be repaired and the cost of repair will be a proper charge against the funds of the post exchange.

61. Reimbursement for loss of mail or express.—See paragraph 10*h*, AR 210-50.

62. Seeds for post gardens.—Seeds for post gardens may be procured from post exchange funds, or from company funds.

63. Automobiles.—*a.* The commanding officer may authorize the purchase and use of automobiles by a post exchange, when justified by the necessities of the command.

b. When so used, they will not be permitted to compete with civilians by carrying persons not employed in the post.

64. Stoppages.—Authorized stoppages for amounts due post exchange will be entered on the pay rolls and deducted at times of payment.

65. Sale of unauthorized uniform clothing prohibited.—Articles of outer uniform clothing, including insignia, which do not conform to the types prescribed for wear by Army Regulations, will not be sold in post exchanges.

66. Prompt payment of bills.—Bills will be paid promptly, so that advantage will be taken of all cash discounts.

SECTION VIII

AUDITING

67. **General.**—The council member detailed to make the monthly audit for the exchange council will examine the accounts of the post exchange in accordance with the provisions of paragraphs 68, 69, 70, and 71.

68. **Cash and cashbook.**—*a.* Count cash on hand. If checks are with the cash, they should be current ones and should be immediately deposited.

b. Verify bank balance. Obtain a list of outstanding checks and secure direct from the depository confirmation of the bank balance.

c. Verify all additions in the cashbook. Call for steward's daily report and see that all cash items are shown on the cash book and that other items are properly accounted for.

d. Compare paid checks with stubs and the latter with the vouchers and disbursements shown by the cashbook. For all disbursements there should be a proper voucher. In case of a bill or invoice being paid that represents a purchase, it should show on its face proper notations to indicate when the goods or materials were received; that they were properly checked as to quantities, quality and prices; that they have been taken up on the books and that the voucher is correct and just.

69. **Ledger.**—*a.* Verify trial balance with ledger.

b. Postings to individual accounts in ledger should be checked against the cashbook to see that all receipts on account of credit accounts and sales have been taken up.

c. Count bills receivable (enlisted men) on hand and compare with amount shown on ledger that should be on hand. Verify whether all issues and payments to the account have been posted.

d. Check the closing entries to profit and loss account. See whether the net profit or loss is shown on the exchange account in ledger.

e. Check all postings to ledger.

70. **Stock record.**—Verify accuracy of stock record account as shown by stock record book. To the value at selling prices of merchandise on hand at beginning of month as shown by inventory, add the value at selling prices, of all merchandise purchased. This gives the total accountability. To the value, at selling prices, of all merchandise sold, returned, expended, and condemned, add the value, at selling prices, of all merchandise on hand at close of month, as shown by inventory. This gives the total credits. Subtract the total credits from the total accountability, report the results of the verification to the exchange council for action in case of discrepancies, and include results in certificate of audit in the form prescribed by paragraph 16*c*(6)(*d*), for the information of the commanding officer. Similarly verify as far as possible the accounts of all other activities (par. 5), investigating such activities from the standpoint of efficiency, the methods used, prices charged, consumption by employees, unit quantities produced by breaking up larger units (e. g., number of glasses of sodas from a gallon in bulk, number of sandwiches from a pound

of ham—a loaf of bread), system of accountability required for such smaller units, and such other matters as the investigation may develop. A report of conditions found and conclusions as to the efficiency of the operation of these activities will be submitted to the exchange council and will be embodied in the council proceedings together with a statement of the action pertaining thereto taken by the council. The verification and the investigation pertaining to such activities as prescribed herein may, at the option of the commanding officer, be delegated to an assistant auditing officer, who shall also be a member of the council.

71. Miscellaneous.—*a.* Verify check account to see the amount outstanding. Any balance should always appear as a liability.

b. Examine expense account and see that all expenditures were proper.

c. Obtain a list of accounts due the exchange and a list of outstanding liabilities. Verify—

(1) The completeness of same by examination of such records as ledger and bill register to insure that it includes the names of all firms and individuals with whom the exchange deals.

(2) The accuracy of same by direct confirmation, so far as practicable, with individuals and firms concerned, regardless of whether or not the balances for the month as indicated by the records are zero.

Check totals with a statement of assets and liabilities. The next auditing officer should ascertain whether any of these accounts have been settled since last audit and properly entered on the books of exchange. Make special notation of delinquent accounts due the exchange.

d. Verify all items on statement of assets and liabilities with ledger accounts, inventories, and other records, and be certain that the several items shown on the statement are correct and just.

SECTION IX

DECISIONS

72. Post exchange funds.—*a.* Funds of a post exchange, although not public moneys within the meaning of sections 5488, 5490, and 5492 of the Revised Statutes, are intrusted to officers of the Army in their official capacity, and their misapplication is punishable under the Articles of War. When practicable, such part of them as is not required for immediate use should be deposited in a bank. For an officer in charge of a post exchange to lend its money to anyone would be a gross breach of trust.

b. Liability of exchange officers for loss by post exchange.—The division exchange officer and the exchange officer of a post exchange allowed the exchange steward to have the combination of the safe. The latter stole over $400 from

the safe and deserted. *Held*, that this was a violation of the Post Exchange Regulations, which provide that no employees shall have access to the cash of the exchange after it has been turned over to the exchange officer, and that the two officers who joined in such violation should bear the loss equally. *See Dig. Ops. J. A. G., June 15, 1918.*

c. An exchange officer who uses funds of the exchange in the cashing of checks does so at his peril and is responsible for any resulting loss.—An exchange officer cashed three checks which were returned with a notation thereon "not sufficient funds." A letter was addressed to the drawer of the checks, but no answer thereto was received. The action of the drawer of the checks does not constitute fraud against the exchange. The funds of the exchange, when not in use for proper exchange purposes, should be kept in a bank and not loaned or used to cash private checks and the exchange officer was without authority to cash any checks out of such funds; having done so, he assumed the risk of loss. The Government is not interested in any proceedings to recover the money or to prosecute the drawer of the checks. *Dig. Ops. J. A. G., May 17, 1919.*

d. Liability of post exchange on account of forged draft cashed by exchange officer—Post exchange; acceptance and negotiation of forged draft.—By indorsing and negotiating a forged draft, a post exchange contracts that it has lawful title thereto and the right to transfer said instrument. It thereby becomes liable to subsequent holders in due course for the face value of the bill, and the bank upon which said draft is drawn has a valid claim against the post exchange for reimbursement of the amount paid by said bank to a holder in due course. The exchange may assert its claim against the exchange officer through whose error the loss arose, but no claim can be enforced against the Government. *Ops. J. A. G., October 4, 1919.*

e. Company exchange; financial responsibility for loss caused by officer's negligence.—The post exchange officer is financially responsible for the loss of money by theft which was taken from an unlocked counter drawer where it had been placed by the exchange steward, for the reason that he failed to take over the post-exchange money from the steward on the night in question, as required by regulations. *Ops. J. A. G., October 28, 1919.*

f. Assessment of damages under the one hundred and fifth article of war against a post exchange when the actual wrongdoer can not be identified.

(1) When damages are to be assessed against soldiers under the one hundred and fifth article of war, where the board finds that the damages were committed by soldiers belonging to the command, but is unable to locate the responsibility more definitely, i. e., the particular soldiers who were the wrongdoers, or the particular organization to which they belong can not be determined, the damages may be collected from the proceeds of the post exchange in which the entire command is interested. *Ops. J. A. G., May 29, 1918.*

(2) Until the board of officers finds that damages to private property were caused by soldiers of the post, and that the organization or organizations to which they belong can not be ascertained, post-exchange funds can not be used in the payment of such claims. *See Ops. J. A. G., November 6, 1919.*

g. Use of funds.

(1) The "recreation fund" defined in paragraph 3 *e*, AR 210-50, which is a fund set aside by the post exchange under paragraph 8 *d*, (2), AR 210-65, for the education and recreation of the enlisted men of the command, may not properly be used for the construction and maintenance of an officer's club. *See Ops. J. A. G., August 20, 1925.*

(2) * * * The uses of post exchange profits authorized by * * * regulations * * * can not be held to include expenditures for the improvement of roads, however beneficial to the garrison. *Ops. J. A. G., January 14, 1925.*

h. Liability of exchange council.—* * * Where losses extending over a period of two years were caused by neglect and mismanagement, held, that the post exchange council as well as the exchange officer should be held responsible for it. *Ops. J. A. G., April 14, 1910.*

i. Liability for loss; general.—For further discussion of this subject see Digest of Opinions, J. A. G., 1912, pages 638-640.

73. **Penalty envelopes.**—*a.* The use of penalty envelopes by officers in charge of post exchanges in conducting correspondence of post exchanges is permitted for all correspondence relating to the conduct of the business thereof, but must not be extended to the carrying of merchandise.

b. Held that penalty envelopes can not be inclosed by an officer in a letter to contractor for use in returning signed vouchers. *Ops. J. A. G., June 22, 1907.*

c. The use of the penalty envelope will be strictly limited to the proper correspondence of the exchange, and will not be used in soliciting custom nor in the delivery of goods.

74. **Stoppages for debt.**—*a. Stoppage of pay of enlisted men for debt due the post exchange.*

(1) Stoppages of pay of enlisted men for debts due the post exchange are only authorized in the settlements of such debts by the finance officer when making payments to enlisted men. Such debts can only be collected from any balance due the soldier after stoppages for debts due the United States have been satisfied.

(2) Travel pay due a soldier on discharge can not be stopped to satisfy a debt due the post exchange.

(3) The amount due the post exchange by a deceased soldier is a debt, and constitutes a proper claim against his estate, and may be legally deducted from the pay and allowances due the same. Post exchanges having claims against a deceased soldier should file them directly with the General Accounting Office.

(4) I am of the opinion and so decide, that where it clearly appears that a soldier is indebted to a post exchange, such post exchange may be reimbursed the amount of such indebtness from the amount of the pay and allowance reserved by section 4818, United States Revised Statutes, from stoppages and fines adjudicated by sentence of courts-martial for the reimbursement of the Government and of individuals. *Decision of Comptroller of the Treasury.*

(5) Section 4818, United States Revised Statutes, provides: "For the support of the Soldiers' Home the following funds are set apart, and are hereby appropriated:

"All stoppages or fines adjudged against soldiers by sentence of courts-martial, over and above any amount that may be due for the reimbursement of Government or individuals. * * *"

(6) In case of a deserter (as well as in case of a discharged or a deceased soldier) who is shown to be justly indebted to the post exchange, a stoppage not exceeding the amount of credit authorized in the regulations may be lawfully made in favor of the post exchange. The decision of April 22, 1902 (21 MS. Comp. Dec. 324), is overruled. *21 Comp. Dec. 109.*

b. Collection of money due from deserter to company fund and exchange.

(1) The pay and allowances forfeited by a deserter by reason of his desertion, which are payable to the United States Soldiers' Home, is that amount to which the soldier would have been entitled had he remained in the service, i. e., whatever sum would have been due him after the payment of his just obligations to the United States and to Government agencies. (See 21 Comp. Dec. 109.) Sums due to the company fund and to the exchange, incurred in accordance with the regulations, are payable from any balance found due him at the time of his desertion, after deducting therefrom any sum in which he may have been indebted to the United States. (Ops. J. A. G., June 26, 1918.) See paragraph 2, AR 35–2440.

(2) The maximum of "one-third of his monthly pay" fixed by the regulations of the War Department as the amount of credit to which an enlisted man may be entitled in any one month at the Army post exchange is measured by the amount of pay the enlisted man would be entitled to for a full month according to his grade and length of service, although he may have actually served only a portion of the month. *3 Comp. Gen. 518.*

(3) See also paragraph 41 *c* and *d*.

75. Post exchange as agent for laundry.—*a.* Post exchanges can not act as agents for private laundries, for a soldier's pay can not be stopped to satisfy a claim of a private person or business concern. There is no legal objection to the post exchange hiring the laundering done by a private laundry, thus becoming the real customer of the laundry, and, in turn, charging the men just and reasonable rates for having their washing done. *Ops. J. A. G., November 8, 1917.*

b. In case of nonpayment by enlisted men for laundry work contracted for as authorized in *a* above, the pay of the defaulters may be stopped to satisfy their indebtedness to the exchange.

c. Work done for hospital.—* * * Held, that under Circular No. 29, W. D., 1923, the post exchange might enter into a contract with a civilian laundry to do the hospital laundry work, the cost to the Government being no greater than if the hospital should deal directly with the laundry, and the profit made by the post exchange being eventually shared by all the military organizations on the post, including the hospital. *Ops. J. A. G., September 29, 1923.*

76. Sales of forage to civilian polo teams.—Sales of forage to civilian polo teams may be met by local post exchanges purchasing forage, other than Government forage, for sale to visiting polo teams.

77. Taxes.—*a. Liability of post exchange to Federal taxes.*—Post exchanges are not liable to the income tax imposed by section 10, war revenue act of October 3, 1917 (40 Stat. 300, 333). While they are, in a sense, associations of military organizations for business purposes, they are nevertheless Government agencies or instrumentalities expressly recognized by Congress in the annual Army appropriation acts, and they are designed to carry out a Government purpose. It has never been the policy of the Government to tax its own enterprises or its own manner or method of doing business. (*Dugan v. United States*, 34 Ct. Cls. 458.) For the same reason neither post exchanges nor officers in charge thereof are liable for the payment of the internal revenue tax for the sale of tobacco imposed by the act of October 22, 1914 (38 Stat. 745, 752). Post exchanges are, however, subject to the stamp tax imposed by said internal revenue act (38 Stat. 763) and accordingly they are not permitted to sell articles of merchandise on which special tax stamps are required until such stamps have been affixed. A post exchange is also subject to the freight tax imposed by sections 500, 501 of the war revenue act of October 3, 1917 (40 Stat. 300, 314), since transportation service rendered to a post exchange is not service rendered to the United States within the exception contained in section 502 of said act. *Ops. J. A. G., April 9, 1918.*

b. Liability of post exchange to tax on admissions to places of amusement.—Post exchanges are conducted solely for the benefit of enlisted men under the supervision of the Government. No part of the proceeds derived from admission fees at places of amusements conducted by post exchanges is payable to any individual, but the entire amount thus collected is used for the benefit of enlisted men in the military service. The Commissioner of Internal Revenue construing the war revenue act of October 3, 1917 (40 Stat. 300, 318), has issued instructions that no tax should be collected for admissions to places of amusement operated by or under the supervision of the Government where no part of the proceeds is payable to individuals, but all such proceeds are exclusively for the benefit of persons in the military service. Consequently the admission fees at places of amusement conducted by such post exchanges are not subject to the war tax on admissions provided for by section 700 of said act. *Ops. J. A. G., May 17, 1918.*

c. Floor tax on tobacco.—Government agencies, such as post exchanges, are required to pay floor tax on tobacco under section 702 of the revenue act of February 24, 1919 (Pub. No. 254, Sixty-fifth Congress, p. 68). (See Dig. Ops. J. A. G. 1917, p. 459.) *Ops. J. A. G., February 28, 1919.*

d. Internal revenue on soft drinks sold at Government agencies.—As the Treasury Department has ruled in a decision dated July 24, 1919, T. D. 7, I. R. 2893, p. 31, the sales of ice cream and soft drinks sold by a municipality, post exchange, the Red Cross, or similar institutions are subject to the tax imposed by the act of February 24, 1919, 40 Stat. 1057, 1116, as the tax falls directly upon the purchaser; and this is not necessarily in conflict with the opinion of this office. *Ops. J. A. G., April, 1919, p. 181.* Since the Treasury Department is charged with the administration of the law its rulings should prevail until reversed by proper authority. *Ops. J. A. G. Aug. 23, 1919.*

e. Automobile livery business.—The tax imposed by subdivision 11 of section 1001 of the revenue act of 1921 on "persons carrying on the business of operating or renting passenger automobiles for hire" is not upon automobiles but upon the privilege of engaging in the automobile livery business. Military organizations owning automobile trucks purchased from their own funds and operating same for their own convenience and on Government business are not taxable thereunder, though a small charge is made for carrying members of such organizations to and from near-by towns, the receipts going to organization funds. *Ops. J. A. G., October 6, 1924.*

f. State taxes.—Generally, the exacting from the Federal Government of a State tax imposed on purchaser even if delivery takes place within the State, as distinguished from delivery on a reservation exclusively under Federal jurisdiction, is illegal, as infringing the right of the United States to exemption of its property and instrumentalities from all State taxation. (See 1 Comp. Gen. 229.) No such condition arises, however, where a State law imposes a tax on the dealer and such tax is included in the purchase price which the Government pays. (See 1 Comp. Gen. 584; 3 ibid. 781; 4 ibid. 1041; 5 ibid. 1022.) A post exchange is not legally liable for local or municipal taxes or licenses on the sale of commodities for the exclusive use of persons in the military service, as such exchange is an instrumentality of the Government of the United States. *Ops. J. A. G., November 21, 1899.*

78. Bus lines.—The operation by a post exchange of a motor-bus line is not an activity authorized by * * * post exchange regulations, * * * but, if its operation is authorized by the War Department, there is no legal objection thereto. *Ops. J. A. G., November 28, 1919.*

79. Subsistence supplies.—A post exchange can not legally sell at a profit food supplies obtained by it from the Quartermaster Corps where the form of such supplies is not changed by the post exchange. The only authority for the sale of such supplies by the Quartermaster Corps to a post exchange is the statutes authorizing the sale thereof to officers and enlisted men. (R. S. sec. 1144; Id. sec. 1145; 28 Stat. 658; 23 Stat. 107, 108.) Hence they can be sold to a post exchange only on the theory that the exchange acts as an agency for their distribution to officers and enlisted men at cost price. Where, however, the form of the supplies is changed by the post exchange by converting ingredients into pastries, etc., they may be sold at a profit. *Ops. J. A. G., January 28, 1919.*

80. Post exchange buildings.—*a. Title; revocable license.*—An Infantry regiment obtained due oral permission to erect and maintain an exchange building at a cantonment and to dispose of it in case of removal. Subsequently the camp commander ruled that on leaving the camp the organization must leave the building as a part of the camp property belonging to the Government. The question of title of the building under the oral license to build is a question of intent of the parties. Here the building apparently belonged to the organization that, with due authority, constructed it, and it has under the license power to sell and remove the same. Orders of the camp commander are without effect in so far as they purport to diminish the title and power of the organization in the matter of the exchange building. But the permit or license is necessarily revocable, and the camp commander may order the removal of the building at any time. *Ops. J. A. G., August 10, 1918.*

b. Buildings constructed by post exchanges; disposition.—Certain buildings erected by the post exchange upon Ellington Field, Tex., solely at the expense of the exchange, remain its property, and they may be sold by the exchange when it has no further use for them. The purchaser may remove the buildings from the reservation. The permission of the post commander is sufficient authority for their sale and removal. *Ops. J. A. G., January 22, 1919.*

c. Expenditure of profits from post exchanges for operation of barber shop.—Expenditure of the profits from a post exchange for the purpose of improving facilities for the operation of the barber shops by way of alterations and extensions of post exchange buildings and acquisition of necessary supplies for carrying on the business is a proper use of the post exchange funds, and such use is authorized by the Post Exchange Regulations. • • • *Ops. J. A. G., September 19, 1918.*

d. Removability of regimental exchange building.—A building was erected by a regimental exchange upon the understanding that it was to be the property of the exchange and to be disposed of by the exchange as its own property when the regiment should leave that post. The division commander thereafter directed that all buildings or structures on the reservation used for military purposes in connection with the camp should become the property of the United States, whether erected by persons in the military service or otherwise. The order was without effect, and the regimental exchange had authority to sell the building and give to the purchaser a good title thereto. The division commander, of course, had power to regulate its use or to require its removal from the reservation at any time. (See Dig. Ops. J. A. G., 1917, p. 472. *Ops. J. A. G. October 1, 1918.*

81. Miscellaneous decisions.—*a. Issue of corn brooms and mops.*—A post exchange is not entitled to the issue of corn brooms and mops.

b. Membership not obligatory.—Membership in the post exchange is not obligatory on the units which go to form a garrison. *Decision of Acting Secretary of War, April 20, 1908—136693, A. G. O.*

c. Receiving compensation.—It is highly improper for a post exchange officer to receive compensation from the post exchange fund for his service as such. *Secretary of War, August 8, 1911.*

d. Suit by or against post exchange; United States attorney to defend any litigation.—It is not the policy of the War Department to interfere in the contractual relations between post exchanges and their creditors where there is a bona fide dispute which appears to be a proper case for judicial determination • • •. (Ops. J. A. G., January 2, 1917.) • • • Litigation on behalf of the post exchange should be in the name of the exchange officer as exchange officer and on behalf of the exchange. (Ops. J. A. G., March 1, 1906.) Under A. R. 105 a post exchange officer is entitled to the legal advice or services of the local United States attorney to protect the rights and interests of the exchange. (See Ops. J. A. G., September 8, 1919.) See AR 210-75.

e. Liability to civil suit on contract.—• • • A post exchange is a voluntary unincorporated cooperative association of Army organizations, a kind of cooperative store, in which all share in the benefits and all assume a position analogous to that of partners. Contracts to purchase goods entered into by the proper officers of a post exchange should be tested by the same rules of obligation which govern like agreements of individuals. In the event of

an inability on the part of a post exchange to pay its debts, the organizations which participate in the post exchange should themselves pay off all such obligations in proportion to their respective interest in the exchange. (Ops. J. A. G., June 4, 1918.) • • • The officers of a post at which a post exchange is located are not liable for its debts. (Ops. J. A. G., January 7, 1911.) • • • Where a post exchange officer was required over his protest to pay out of his private funds for certain supplies ordered, furnished, and used by the post exchange, • • • and the exchange was dissolved, • • • recommended that the post exchange officer be reimbursed • • • by the several organizations comprising the exchange at the time the indebtedness was incurred. *Ops. J. A. G., March 6, 1911; October 3, 1911.*

f. Reimbursement for loss while attempting to save property.—As property of the regimental or post exchange can not be treated as property belonging to the United States, an enlisted man whose property was destroyed while he was giving attention to saving property of the exchange is not entitled to reimbursement. *25 Comp. Dec. 960.*

g. Insurance.—Organizations which have erected recreation halls on Government land at their own expense under revocable licenses from the Secretary of War, by virtue of which they have the full right of use, occupancy, and enjoyment of such buildings until the licenses are terminated, and post exchanges which have erected buildings out of their own funds, have such an insurable interest in these buildings as will support a fire insurance policy. The consent of the United States to such insurance would add nothing to the validity of the policy, which is dependent on the facts as they exist. *Ops. J. A. G., February 16, 1924.*

SECTION X

COMPANY OR DETACHMENT

82. **General.**—*a.* The establishment of company or detachment exchanges is not authorized where a post exchange is established.

b. Company or detachment exchanges may be established when there is no post exchange and when in the opinion of the organization commander such exchange is desirable.

c. Company and detachment exchanges will conform as far as practicable to regulations prescribed for post exchange.

[A. G. 331.36 (5–1–29).]

BY ORDER OF THE SECRETARY OF WAR:

C. P. SUMMERALL,
General,
Chief of Staff.

OFFICIAL:
C. H. BRIDGES,
Major General,
The Adjutant General.

U. S. GOVERNMENT PRINTING OFFICE: 1929

[fols. 57-67] EXHIBIT "B" TO COMPLAINT

AR 210-65
*C 3

POSTS, CAMPS, AND STATIONS

EXCHANGES

CHANGES No. 3

WAR DEPARTMENT,
WASHINGTON, *March 9, 1940.*

AR 210-65, June 29, 1929, is changed as follows:

5. Activities included.

* * * * * * *

b. Restrictions.

* * * * * * *

(3) Except in Panama Canal Zone, Puerto Rico, Philippines, and China, articles for sale will be limited to those of small personal needs, not similar to those furnished by the Government.

[A. G. 331.36 (7-23-37).]

(4) No goods will be held on consignment or to be paid for by exchanges when sold to consumers. Exchanges within the continental limits of the United States will not authorize individuals to make purchases from other agencies and charge the amount to the exchange, nor will such exchanges order merchandise from other agencies for direct delivery from such agency to the customer.

* * * * * * *

[A. G. 331.36 (4-14-36).]

6½. Exempted stations.—Correspondence on matters pertaining to post exchanges at exempted stations will be forwarded to the War Department through corps area commanders who will indorse thereon their recommendations in the matter.

[A. G. 331.36 (1-13-40).]

7½. Sales; to whom made.—Post or unit exchanges are authorized to sell to, or make purchases for, the following-named persons and organizations only. Purchases by individuals will be limited to those required for their own use or for the use of dependent members of their families.

a. Officers, warrant officers, and enlisted men of the Regular Army on the active or retired list, former emergency officers who have been placed upon the Emergency Officers' Retired List created by the act of May 24, 1928 (45 Stat. 735; 38 U. S. C. 581; M. L., 1929, sec. 1122), retired enlisted naval personnel, and naval personnel detailed, assigned, or serving with the Army.

b. Army nurses.

c. Contract surgeons.

d. Members of the Officers' Reserve Corps and the Enlisted Reserve Corps while on active duty.

e. Officers, warrant officers, and enlisted men of the National Guard and inactive National Guard when in Federal service.

f. Civilian employees authorized for service abroad, having a status recognized by the War Department as part of an expeditionary force.

g. Civilians employed or serving at military posts, including veterans in Army hospitals and members of the Civilian Conservation Corps.

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*These changes supersede C 2, October 30, 1933.

h. Officers, warrant officers, and enlisted men of the National Guard and inactive National Guard—

(1) When in attendance at service schools or when attached to organizations of the Regular Army for routine practical instruction.

(2) When engaged in joint maneuvers with the Regular Army.

(3) When in camp at a station where exchanges are being operated.

i. Persons in actual attendance at Reserve Officers' Training Corps camps and Citizens' Military Training Camps at a station where exchanges are being operated.

j. Units and components thereof of—

(1) The Regular Army.

(2) The Officers' Reserve Corps, the Organized Reserves, and the Enlisted Reserve Corps while on active duty.

(3) The National Guard and inactive National Guard when in Federal service or when engaged in joint maneuvers with the Regular Army or when in camp at a station where exchanges are being operated.

(4) Reserve Officers' Training Corps when in camps for such corps at stations where exchanges are being operated.

(5) Citizens' Military Training Camps when such camps are located at stations where exchanges are being operated.

k. Dependent members of the families of persons who are authorized to purchase at post exchanges may act as agents for such persons upon proper identification.

[A. G. 331.36 (8–31–38).]

8. General.

* * * * * * *

d. Cash reserve. (As changed by C 1, Aug. 25, 1930.)

(1) Sufficient cash must be kept on hand or in bank to pay all bills promptly and to take advantage of all cash discounts.

(2) Assets, such as bills receivable, enlisted men, and charge accounts, which are collectible on or before dates prescribed by Army Regulations, and in time to provide the cash required for the purpose specified in (1) above, may be considered as cash. No other assets may be so considered.

[A. G. 331.36 (9–10–29).]

e. Distribution of profits.—After providing for the cash reserve required by *d* above, the net profits of the exchange will be disposed of in the following manner at the end of each quarter, or oftener if deemed advisable by the council and the commanding officer:

(1) Five percent will be set aside as a fund which will be divided among the members of the exchange proportionately to the authorized enlisted strength for the post, camp, or station of the member organizations or detachments. It will be distributed as follows:

(*a*) Where the members belong to regiments the share of such members will be paid into their regimental funds except in the case of a detached battalion (par. 4c, AR 340–5). For action in case of a detached battalion see (*e*) below.

[A. G. 331.36 (8–23–38).]

* * * * * * *

(*e*) Where the members belong to a detached battalion, as defined in paragraph 4*c*, AR 240–5, the share of such members will be paid into their battalion headquarters fund, except that if any band or bands are serving at the post such portion of their share as is deemed equitable by the council and the commanding officer will be paid to such band or bands, and the remainder into the battalion headquarters fund. The battalion headquarters fund will compensate the regimental fund for expenditures which have been approved by the commander of the corps area in which the exchange is located as clearly for the benefit of the members of the battalion, to the extent of not more than one-half of the funds paid into the battalion headquarters fund under this authority after notice of the approval of a particular expenditure made or to be made by the regimental fund.

[A. G. 331.36 (8–23–38).]

* * * * * * * *

(3) * * *

* * * * * * * *

(*d*) (As changed by C 1, Aug. 25, 1930.) Athletic equipment and prizes for use of the garrison and for such Reserve Officers' Training Corps camps and Citizens' Military Training Camps as may be in operation on the reservation.

The expenditure of profits for purposes other than these requires the approval of the corps area commander.

[A. G. 354.17 (11–26–29).]

f. *Liquidation of shares.* (As changed by C 1, Aug. 25, 1930.)

(1) A division of the cash resources * * *

(2) The amount of any loss that an exchange may sustain * * *

[A. G. 331.36 (9–10–29).]

14. Withdrawal from exchange.

* * * * * * * *

b. General procedure, withdrawal.—(As changed by C 2, Oct. 30, 1933.) When an organization withdraws from an exchange as contemplated by *a* above, the procedure will be similar to that for admission to membership prescribed in paragraph 10. The value of its share of the net worth being determined, that sum will be withdrawn from the gross funds of the exchange and paid over to the withdrawing organization. The exchange will turn over to the withdrawing organization any of its enlisted men's notes, and the amount thereof will count as cash payment to the organization. Any amount due but, for lack of available funds, not paid to an organization when retiring from an exchange will be evidenced by a note for the amount, with legal interest, and will be liquidated as other bills, payable out of the first profits accruing to the exchange. The amount so due and unpaid will be carried on the books of the exchange as an "account payable" and be regarded as a liability until paid.

[A. G. 331.36 (11–23–32).]

16. General.

c. *Post exchange council.*

(6)

(a) Either, that he has audited all the accounts and records of the exchange in detail as required by section VIII; or that he has, with the assistance of the accountant (give individual or firm name), audited all the accounts and records of the exchange in detail as required by section VIII.

[A. G. 331.36 (4-10-38).]

(d) That the following results were obtained from verification, under paragraph 70, of the stock record account:

	Selling price
Inventory, beginning of month	$
Merchandise purchased during month	
Total accountability	$
Receipts from sales during month	
Other credits:	
Merchandise returned	
Merchandise condemned	
Merchandise expended	
Inventory, end of month	
Total credits and on hand	
Difference	

The difference disclosed by the foregoing verification will be separated to show the various departments in which differences have occurred, and where the differences in any department show more than one percent (plus or minus) of the sales, the cause for such differences will be investigated by the council, or a committee thereof, with a view to fixing responsibility therefor and making recommendations with respect thereto. Findings of the council will be entered in the council book for the action of the commanding officer.

[A. G. 331.36 (7-23-37) (2-6-39).]

(8) A statement of the result of the monthly investigation and of the accounts of the exchange officer, showing the receipts and expenditures during the month; the assets and liabilities, and the value or net worth of the exchange at the end of the month; the increase or decrease in the value of the exchange since last report;

the profit or loss in the different departments, etc., constituting this increase or decrease and the percentage of gross profits, all a part of the proceedings, will be entered in the post exchange council book which will be kept at each post and submitted to the commanding officer for his action. Should the post or other commander disapprove the proceedings, and the council, after reconsideration, adhere to its conclusions, a copy of the proceedings will be sent by the commanding officer to the corps area commander, whose decision thereon will be final. The final orders in each case will be entered in the council book. A copy of the statement, with the commanding officer's remarks indorsed thereon, will be exhibited in a conspicuous place in one of the rooms of the exchange during the ensuing month. Any question not involving pecuniary responsibility upon which the exchange council and commanding officer may disagree will be submitted for final decision to the corps area commander.

The commanding officer's remarks will include a certificate that the exchange was operated, during the period covered by the report, in compliance with section 3 of the "Military Appropriation Act, 1938," which provides as follows:

Sec. 3. No part of any appropriation made by this Act shall be used in any way to pay any expense in connection with the conduct, operation, or management of any post exchange, branch exchange, or subexchange within any State, Territory, or the District of Columbia, save and except for real assistance and convenience to military personnel and civilians employed or serving at military posts and to retired enlisted naval personnel in supplying them with articles of small personal needs, not similar to those furnished by the Government: *Provided*, That the commanding officer of the post at which any such exchange is situated shall certify on the monthly report of the post exchange council that such exchange was, during the period covered by such report, operated in compliance with this section: *Provided further*, That at posts isolated from a convenient market the Secretary of War may broaden the nature of the articles to be sold. *Military Appropriation Act, 1938.*

[A. G. 331.36 (7-23-37).]

16½. Employees.—*a. General.*—It is the policy of the War Department that insofar as is practicable the operation of post exchanges will be accomplished with civilian employees.

b. Enlisted employees.

(1) At small posts where the volume of business is too small to employ civilians without financial loss, the corps area commander or the commander of an exempted station may authorize the employment of not to exceed three enlisted men in each exchange, including all branches thereof.

(2) In a temporary exchange operated in the field or at a summer training camp the number of enlisted employees will be as authorized by the local commander but will be restricted to minimum requirements as indicated by the size of the exchange

and by the practicability or impracticability of employing civilians.

(3) The wage paid by an exchange to an enlisted employee will not exceed one-half of his base pay, under the act of June 10, 1922, excluding therefrom any longevity allowance or other additional pay.

(4) Insofar as is practicable, enlisted men employed in an exchange will be from organizations participating in the exchange.

(5) The employment of enlisted men by post exchange concessionaries is prohibited.

c. Oversea departments and Army transports.—Because of the special conditions surrounding the operation of post exchanges in oversea departments and on Army transports, department commanders and the commanding generals of ports of embarkation are authorized to depart from the provisions of *a* and *b* above, when in their judgment, the enforcement of those provisions is impracticable. Such departures will be approved in each case by the commanding general of the department or port of embarkation concerned and will be governed by the following policies:

(1) The number of enlisted men employed will be restricted to minimum requirements as indicated by the prevailing special conditions.

(2) The additional compensation to enlisted men will be adapted to the prevailing special conditions and will be such as not to overemphasize the value of the services rendered by post exchange employees in comparison with similar services rendered by other enlisted men as a normal military duty and without additional compensation.

[A. G. 331.36 (9-26-39).]

18. Exchange steward.—*a. General.*—The exchange steward should possess a good knowledge of commercial customs, should be of unquestionable integrity, and of sufficient firmness and strength of character to enforce order and discipline about the premises.

* * * * * * *

[A. G. 331.36 (9-26-39).]

19. Assistants.—Rescinded.

[A. G. 331.36 (9-26-39).]

23. Employment of auditing accountant.—With the approval of the commanding officer, an exchange council may authorize the employment of an expert accountant at stated intervals to audit the books of the exchange, the expense to be borne by the exchange. In such cases the commanding officer and the post exchange council retain their full responsibility. However, the officer designated to make the audit may work with the accountant; in which case the officer is authorized to amend the certificate required of him as indicated by paragraph 16*c* (6) (*a*).

[A. G. 331.36 (4-19-38).]

25. General.—(As changed by C 1, Aug. 25, 1930.) Successful management, and a safeguarding of the responsibility of the exchange officer for the property under his control, require the adoption in each exchange of a system of checks

and controls over the stock both in storerooms and in salesrooms, designed to prevent stock losses and to render practicable the fixing of personal responsibility where such losses occur; such a system will be adopted in each exchange. The system to be adopted in a given exchange will depend to a certain extent upon its size and the number of its departments. While deviations from the details of any system suggested herein are authorized, particularly with respect to the making of individual sales slips for cash sales at cigar, candy, and soft-drink counters, it is to be understood by all concerned that full responsibility devolves upon the commanding officer, the exchange officer, and the exchange council for the efficacy and proper maintenance of the system adopted. The following suggestions are based upon the systems which have been found most satisfactory by experienced exchange officers:

* * * * * * *

[A. G. 331.36 (4-24-30).]

27. General.

* * * * * * *

c. Destruction of old records.—(As changed by C 2, Oct. 30, 1933.) All invoices, receipted bills, and other books and papers relating to the business of an exchange, xcept the exchange council book, and pertaining to accounts that have been closed more than eight years, may be salvaged as no longer required for the protection of the exchange, except in the case of an exchange where the statute of limitations prescribes a longer period on such accounts, in which case the papers will be kept for such longer period, unless with respect to an entry or omission of an entry therein a civil claim or criminal action shall have been presented or initiated, under which circumstances the destruction of the records concerned will be postponed until after disposition of the claim or criminal action. Under the direction of the commanding officer, the papers specified will be salvaged by the exchange officer who will record the action in the exchange council book.

* * * * * * *

[A. G. 331.36 (6-23-32).]

30. Ledger.

* * * * * * *

b. Heads under which accounts kept.—In the ledger, accounts will be kept under the following heads:

(1) *Post exchange.*—To show the value of the exchange. This account will be credited with any increase and debited with any decrease in the worth of the exchange.

* * * * * * *

[A. G. 331.36 (9-21-36).]

36. Granting of credit, general.—*a.* Upon the recommendation of the council, approved by the commanding officer, credit may be given at an exchange to any enlisted man upon the recommendation of the company or detachment commander, to an amount not exceeding in any one month one-third of his month's pay, except that a noncommissioned officer of the first, second, or third grade may be allowed a credit account in an amount not exceeding in any one month

the amount of his unencumbered pay for that month, and except that when conditions make it appear desirable, post commanders are authorized to approve recommendations of organization commanders for the extension to enlisted men of additional credit for special purposes, and to authorize term payments to officers and enlisted men. Applications for credit under this authority will be considered and acted upon individually in each case. Credit will not ordinarily be extended to an enlisted man between the date of last payment on rolls before discharge and the date of discharge. It will be given upon the request of the enlisted man, in writing. Enlisted men granted credit will be distinctly informed that it is their duty to make prompt and unsolicited payment to the exchange officer on the next pay day. Defaulters will be debarred the privileges of the exchange.

* * * * * * *

[A. G. 331.36 (10–20–38).]

46. **Government funds for post exchanges.**—(As changed by C 2, Oct. 30, 1933.) Buildings are maintained for recreational purposes at posts, camps, and stations from funds appropriated for repairs to barracks, quarters, and other military structures.

Recreational activities set up at posts, camps, and stations are maintained from funds made available by the War Department. The amount of funds so made available is normally dependent on the amount included in the appropriation act for the fiscal year.

[A. G. 331.36 (10–30–33).]

54. **Cashing of final statements and personal checks.**—*a. Final statements.*

(1) *General.*—Post exchanges are prohibited from cashing final statements of discharged enlisted men unless a disbursing officer is not readily accessible. No charge will be made for the accommodation, but to insure against loss due to error a part of the value of the final statement will be retained until the account is paid. The amount retained, less the cost of the transaction, will be transmitted to the enlisted man as soon as the actual state of the account is known.

(2) *Exchange not liable for overpayment.*—An exchange assumes no liability for errors for overpayments to enlisted men made by disbursing officers, the liability resting on the officer who signs the final statements or the disbursing officer who pays them, according to the source of the error.

b. Personal checks.—Post exchange funds may be used to cash checks under such restrictions as to amount and identification as may be imposed by the post exchange officer and the exchange council and approved by the post commander. Any fees or charges made by banks due to depositing checks which have been cashed should be charged by the post exchange to the persons for whom the checks are cashed. See paragraph 56*b*.

[A. G. 331.36 (5–23–39).]

72. **Post exchange funds.**

* * * * * * *

c. An exchange officer who uses funds of the exchange in the cashing of checks does so at his peril and is responsible for any resulting loss.—Rescinded.

* * * * * * *

[A. G. 331.36 (5-23-39).]

77. Taxes.

* * * * * * *

f. State, territorial, or local taxes.—Questions as to whether any State, territorial, or other local taxes are payable, arising within the geographical limits of a corps area, including exempted stations, will be forwarded to the corps area commander for decision. The corps area commander, in case he deems it necessary, may forward any such question to the War Department for decision, accompanied by the opinion thereon of the judge advocate of such corps area. In no event will a ruling by a State, territorial, or local authority that such a tax is payable be acted upon without reference to the corps area commander.

[A. G. 331.36 (3-2-38).]

81. Miscellaneous decisions.

* * * * * * *

g. Insurance.

(1) *Fire.*—(As changed by C 2, Oct. 30, 1933.) Organizations which have erected recreation halls on Government land at their own expense under revocable licenses from the Secretary of War, by virtue of which they have the full right of use, occupancy, and enjoyment of such buildings until the licenses are terminated, and post exchanges which have erected buildings out of their own funds, have such an insurable interest in these buildings as will support a fire insurance policy. The consent of the United States to such insurance would add nothing to the validity of the policy, which is dependent on the facts as they exist. *Ops. J. A. G. February 16, 1924.*

[A. G. 331.3 (9-4-31).]

(2) *Liability.*

(*a*) Exchanges have a moral responsibility for any injury to individuals or for physical damage to property resulting from their operation, and, in cases where there is a reasonable possibility of such injury or damage, should carry liability insurance, payment therefor to be made from exchange funds.

(*b*) When employees of an exchange are required or authorized in the course of their employment to operate motor vehicles owned either by the exchange or by private individuals, the exchange will carry liability insurance in a reasonable amount, under the circumstances existing, in favor of the exchange covering personal injury to individuals and damage to property resulting from such operation.

(*c*) The policy covering liability insurance will contain a stipulation, or rider, to the following effect:

The company agrees that the fact that the insured is a Government instrumentality will not be interposed

as a defense in any suit in which the company's liability under this policy is in any way concerned, unless so requested in writing by the insured.

In no case will such defense be requested of the company by an exchange unless and until it has been specifically authorized to do so by the War Department.

[A. G. 331.36 (8–24–38).]

(3) *Compensation.*—(As added by C 2, Oct. 30, 1933.) Expenditure of exchange funds to purchase employees' compensation insurance is also authorized where the number of civilian employees justify. The kind of insurance carried should meet the requirements of local laws on the subject.

[A. G. 331.3 (9–4–31).]

BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
Chief of Staff.

OFFICIAL:
E. S. ADAMS,
Major General,
The Adjutant General.

For sale by the Superintendent of Documents, Washington, D. C. - - - - - - - - Price 5 cents

[fol. 68] EXHIBIT "C" TO COMPLAINT

Excerpt from Circular No. 66

"Circular No. 66 — War Department, Washington, June 28, 1940.

Assignment of Reserve officers on extended active duty to duties involving money or property accountability I
Per diem allowances for officers of the Regular Army and Reserve officers on duty in connection with encampments of the Organized Reserves II
Changes in AR 210–65 III

* * * * * * *

III—Changes in AR 210-65. Pending the revision of AR 210-65, June 29, 1929, paragraph 7½ is superseded and paragraph 16*c*(8) is changed as follows:

7½. *Sales; to whom made.—a.* Post or unit exchanges are authorized to sell to, or make purchases for, the following-named persons and organizations only. Purchases by individuals will be limited to those required for their own use or for the use of dependent members of their families.

(1) Such personnel and organizations as are now or may be hereafter authorized by law and regulation to purchase subsistence stores or other quartermaster supplies (see pars. 2 and 6, AR 30-2290).

(2) Civilians employed or serving at military posts.

b. Dependent members of the families of persons who are authorized to purchase at post exchanges may act as agents for such persons upon proper identification.

16*c*(8) A statement of the result * * * for final decision to the corps area commander.

The commanding officer's remarks will include a certificate that the exchange was operated, during the period covered by the report, in compliance with section *4* of the 'Military Appropriation Act, *1941*,' which provides as follows:

Sec. *4*. No part of any appropriation made by this Act shall be used in any way to pay any expense in connection

with the conduct, operation, or management of any post exchange, branch exchange, or subexchange within any [fol. 69] State, Territory, or the District of Columbia, save and except for real assistance and convenience *under such regulations as the Secretary of War may prescribe,* to *such* personnel *as are now or may be hereafter authorized by law and regulation to purchase subsistence stores or other Quartermaster supplies and to* civilians employed or serving at military posts in supplying them with articles of small personal needs, not similar to those furnished by the Government: *Provided,* That the commanding officer of the post at which any such exchange is situated shall certify on the monthly report of the post exchange council that such exchange was, during the period covered by such report, operated in compliance with this section: *Provided further,* That at posts isolated from a convenient market the Secretary of War may broaden the nature of the articles to be sold. *Military Appropriation Act, 1941.*

(A. G. 331.36 (5-27-40).)

By order of the Secretary of War:

G. C. Marshall, Chief of Staff.

Official: E. S. Adams, Major General, The Adjutant General."

[fol. 70] EXHIBIT "D" TO COMPLAINT

Excerpt from Circular No. 78

"Circular No. 78

War Department, Washington, July 26, 1940.

	Section
Service uniform	I
Classification of TM 2170-6	II
Changes in AR 25-10	III
Changes in AR 130-10	IV
Changes in AR 210-65	V
Changes in AR 30-2210	VI

. . . . . .

V—Changes in AR 210-65. Pending the revision of AR 210-65, June 29, 1929, paragraph 51*f*(2) of those regulations is rescinded.
(A. G. 331.3 (7-6-40).)

* * * * * * * *

By order of the Secretary of War:
G. C. Marshall, Chief of Staff.

Official: E. S. Adams, Major General, The Adjutant General."

[fol. 71] EXHIBIT "E" TO COMPLAINT

Excerpt from Circular No. 122

"Circular No. 122

War Department,
Washington, October 26, 1940.

	Section
Changes in AR 210-65	I
Temporary privileges in a post exchange	II
Post exchange concessions	III

I—Changes in AR 210-65.—Pending the revision of AR 210-65, June 29, 1929, the following changes in those regulations are published:

1. Paragraph 1*f* is added as follows:

f. Large posts or camps.—At large posts, camps, or stations, each division or organization of similar strength is authorized to establish a separate post exchange, including its branches and subexchanges. The commanding officers of organizations authorized to establish such separate exchanges will exercise the authority and responsibility prescribed by paragraph 2.

2. Paragraph 5*b* is rescinded and the following substituted therefor:

b. Restrictions.—(1) It is the policy of the War Department that all authorized activities of the post exchange generally be conducted by the several local post exchanges and not by concessionaires. Concessionaire operations will be permitted only when questions of local taxation are not thereby involved.

(2) The main store of an exchange will, in all cases, be operated by the exchange.

(3) Concessions will not be granted to private individuals, firms, or corporations to operate any of the foregoing exchange activities (*a* above), without the authority of the army or corps area commander. Agreements with reference to concessions shall neither state nor imply that any rental is to be charged the concessionaire for occupancy of space in buildings or for the use of utilities or facilities on the military reservation. These agreements should also provide that the post authorities retain supervision of the activities and control of the prices to be charged.

(4) When concessions occupy real estate not under con- [fol. 72] trol of the post exchange, a license or lease is required. (AR 30-1410 and 1420).

(5) Activities other than those enumerated in paragraph 5*a* will not be added to the business of the exchange without authority of the War Department.

(6) Except in Panama Canal Zone, Puerto Rico, Philippines, and China, articles for sale will be limited to those of small personal needs, not similar to those furnished by the Government.

(7) No goods will be held on consignment or to be paid for by exchanges when sold to consumers.

(8) The use of any device which savors of gambling, such as punch boards, slot machines, etc., is prohibited.

3. Subparagraphs *d* and *e*(1), paragraph 8 are rescinded and the following substituted therefor:

d. Financial policies.—(1) Sufficient cash must be kept on hand or in bank to take advantage of all cash discounts.

(2) Purchases by the post exchange for merchandise and equipment will be so regulated that the amounts indicated in (1) above, together with current accounts receivable (Note 1) will be sufficient to pay all current liabilities (Note 2) not later than the 15th of the month following such purchases except that purchases made during the first three months following initial establishment of the exchange may,

when authorized by the council, be made not later than the 15th of the second month following such purchases.

Note 1: Current accounts receivable, as used herein, will include only bills receivable, enlisted men, and charge accounts which are collectible on or before the 10th of the month following the transaction.

Note 2: Current liabilities, as used herein, will include all indebtedness of any nature or type which are due and payable during the month following the transaction. They will also include amounts due and payable during the current month on—

(*a*) Purchases made on a monthly basis.

(*b*) Notes payable to organizations which have withdrawn from the post exchange.

(3) The post exchange council, with the approval of the commanding officer, may authorize:

(*a*) Purchases on a monthly payment basis for equipment and fixtures to be used in the operation of the exchange, provided such monthly payments will terminate [fol. 73] within one year from date of purchase.

(*b*) The issue of notes, due and payable monthly, for the purpose of liquidating the indebtedness to an organization which withdraws from the post exchange. See paragraph 14*b*.

(4) In the establishment of new exchanges the stock of merchandise and purchase of fixtures and equipment will be held to the minimum, consistent with efficient operations, so that cash reserves will accumulate for payment of dividends to participating organizations.

(5) The monthly financial statement will include a charge for depreciation of fixtures and equipment in order to reduce the investment value of fixed property assets, and to properly distribute the costs of capital or profit consumed in operations. Depreciation rates should be sufficient to insure the book value being less than the current market value.

e. Distribution of profits.—After providing for the payment of all current liabilities, as indicated in *d*(1) and (2) above, the net profits of the exchange will be disposed of

in the following manner at the end of each quarter, or oftener if deemed advisable by the council and the commanding officer:

(1) Five percent will be set aside for distribution to the bands of the post or bands of member organizations and to headquarters funds which do not participate in post exchange dividends. The disbursement will be in accordance with a schedule approved by the army or corps area commander.

4. Paragraph 14*b* is changed as follows:

b. General procedure, withdrawal.—When an organization withdraws from an exchange as contemplated by *a* above, the procedure will be similar to that for admission to membership prescribed in paragraph 10. The value of its share of the net worth being determined, that sum will be withdrawn from the gross funds of the exchange and paid over to the withdrawing organization. The exchange will turn over to the withdrawing organization any of its enlisted men's notes, and the amount thereof will count as cash payment to the organization. Any amount due but, for lack of available funds, not paid to an organization when retiring from an exchange will be evidenced by a note for the amount and will be liquidated out of profits accruing to the exchange. The amount so due and unpaid will be carried on the books of the exchange as an "account payable" and be regarded as a liability until paid.

[fol. 74] 5. Paragraph 16½*b*(1) is rescinded and the following substituted therefor:

(1) The army or corps area commander will make requisite limitations on the number of enlisted men employed in post exchanges.

(A. G. 331.36 (10-17-40).)

* * * * * * *

By order of the Secretary of War:

G. C. Marshall, Chief of Staff.

Official: E. S. Adams, Major General, The Adjutant General."

[fol. 75] EXHIBIT "F" TO COMPLAINT

Excerpt from Circular No. 151

"Circular
No. 151

War Department,
Washington, December 12, 1940.

III—Changes in AR 210-50 and AR 210-65. Pending the printing of changes in AR 210-50, November 1, 1938, and AR 210-65, June 29, 1929, the following changes in those regulations are published:

1. *AR 210-50.* Paragraph 4*d* (1) is changed and 8*e* is added as follows:

4*d*(1) To provide means for contributing to the welfare, comfort, pleasure, contentment, and the mental and physical improvement of the members of the command to which the fund pertain. *The fund may be used to defray, wholly or in part, the cost of publishing a news periodical of the camp or station when such news medium does not carry paid advertising of any sort.*

8*e*. The sale of a news periodical produced as an activity of the recreation fund is authorized.
(A. G. 123.1*c*(11-15-40).)

2. *AR 210-65.*—Paragraph 5*a*(8) is added as follows:

5*a*(8) Publication of a news periodical, either by the exchange itself or by a concessionaire, when it does not carry paid advertising of any sort.
(A. G. 331.36 (11-15-40).)

By order of the Secretary of War:
G. C. Marshall, Chief of Staff.

Official: E. S. Adams, Major General, The Adjutant General."

[fol. 76] EXHIBIT "G" TO COMPLAINT

Excerpt from Circular No. 39

"Circular
No. 39

War Department,
Washington, March 12, 1941.

I—Changes in AR 210-65. Pending the revision of AR 210-65, June 29, 1929, so much of paragraph 2, section I, Circular No. 122, War Department, 1940, as relates to paragraph 5*b*(1) is rescinded and the following substituted therefor:

5*b*(1) It is the policy of the War Department that all authorized activities of the post exchange generally be conducted by the several local post exchanges and not by concessionaires. A concession contract will be approved only when the contract embodies express provision to the effect that the concessionaire assumes complete liability for all local taxes applicable to the property, income, and transactions of the concessionaire.

(A. G. 331.36 (10-29-40).)

* * * * * * *

By order of the Secretary of War:

G. C. Marshall, Chief of Staff.

Official: E. S. Adams, Major General, The Adjutant General."

[fol. 77] EXHIBIT "H" TO COMPLAINT

Excerpt from Circular No. 48

"Circular
No. 48

War Department,
Washington, March 24, 1941.

	Section
Changes in AR 35-1540, 35-1760, and 35-5320	I
Changes in AR 210-65	II

II—Changes in AR 210-65.—Pending the revision of AR 210-65, June 29, 1929, the following changes to those regulations are published:

1. The second sentence of paragraph 49 is changed as follows:

'In no case will a post exchange, post laundry, *or* a concessionaire bidding as such be permitted to enter into public competition or to submit bids in response to advertisements calling for proposals for furnishing supplies or services.'
(A. G. 331.36 (11-20-40).)

2. Paragraph 51*b*(1) is rescinded and the following substituted therefor:

51*b*(1) The purchase by the exchange of merchandise needed by concessionaires in the operation of their concession is prohibited except where it has been determined and made of record that matters of taxation are not involved.
(A. G. 331.36 (3-11-41).)

By order of the Secretary of War:
G. C. Marshall, Chief of Staff.

Official: E. S. Adams, Major General, The Adjutant General."

[fol. 78] [File endorsement omitted]

IN SUPERIOR COURT OF SACRAMENTO COUNTY

[Title omitted]

ANSWER TO COMPLAINT—Filed May 5, 1941

Now comes the defendant and for answer to plaintiff's complaint on file herein admits, denies, and alleges as follows:

I

Admits the allegations contained in paragraphs I, II, III, IV, V, and VI of said complaint.

II

Denies generally and specifically each and every allegation contained in paragraph VII of said complaint.

[fol. 79]

III

Denies generally and specifically each and every allegation contained in paragraph VIII of said complaint.

IV

Denies generally and specifically each and every allegation contained in paragraph IX of said complaint, save and except defendant admits that neither the whole nor any part of the amount referred to in said paragraph IX has been repaid or refunded to plaintiff.

Wherefore, defendant prays that plaintiff take nothing by its complaint on file herein and that defendant have judgment for its costs of Court herein incurred, and such other and further relief as to this Court may seem meet and just in the premises.

Earl Warren, Attorney General; H. H. Linney, Deputy; Adrian A. Kragen, Deputy, Attorneys for Defendant.

[fol. 80] [File endorsement omitted]

IN SUPERIOR COURT OF SACRAMENTO COUNTY

[Title omitted]

CONCLUSIONS OF LAW—Filed May 23, 1941

This cause came on regularly for trial on the 5th day of May, 1941, before this court, plaintiff being represented by Messrs. Pillsbury, Madison & Sutro, and defendant being represented by Earl Warren, Attorney General of the State of California, and H. H. Linney and Adrian A. Kragen, deputies attorney general; and all of the facts having been admitted and the evidence being closed, and the court being [fol. 81] fully advised in the premises and having rendered its decision, now makes its conclusions of law.

From the facts as appearing by the pleadings of the parties herein filed, the Court makes the following its

Conclusions of Law

I

That Post Exchanges organized under the provisions of Army Regulations No. 210-65 and No. 21-65C3, as well as amendments to said regulations, are not instrumentalities of the United States Government.

II

That Post Exchanges organized under the provisions of Army Regulations No. 210-65 and No. 210-65C3, as well as amendments to said regulations, are not agencies of the United States Government.

III

That a sale of motor vehicle fuel to a Post Exchange is not a sale to the Government of the United States or any department thereof for official use of said government within the meaning of section 10 of the Motor Vehicle Fuel License Tax Act.

IV

That plaintiff is not entitled to judgment in the sum of $526.08, nor in any other amount, and defendant is entitled to judgment for his costs of court herein incurred.

Malcolm C. Glenn, Judge of the Superior Court.

[fol. 82] [File endorsement omitted]

IN SUPERIOR COURT OF SACRAMENTO COUNTY

No. 63124. Dept. 3

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, Plaintiff,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California, Defendant

JUDGMENT—Entered and Filed May 23, 1941

The above entitled cause came on regularly for trial on May 5, 1941, before the Court sitting without a jury, plaintiff being represented by Messrs. Pillsbury, Madison & Sutro and defendant being represented by Earl Warren, Attorney General of the State of California, and H. H. Linney and Adrian A. Kragen, Deputies Attorney General, the facts having been admitted, and the evidence being closed, the Court having heretofore made and caused to be filed herein its Conclusions of Law, and the Court being fully advised: wherefore, by reason of the law and the admitted facts aforesaid,

[fol. 83] It Is Hereby Ordered, Adjudged, And Decreed that plaintiff take nothing by its complaint on file herein.

Dated May 23, 1941.

Malcolm C. Glenn, Judge of the Superior Court.

(Seal.)

Attest: T. F. Patterson, Clerk, by Thos. J. Dillon, Deputy Clerk.

[fol. 84] [File endorsement omitted]

IN SUPERIOR COURT OF SACRAMENTO COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed June 3, 1941

To T. F. Patterson, County Clerk of the County of Sacramento, State of California:

Please take notice that *Standard Oil Company of California*, plaintiff in the above entitled action, appeals to the

Supreme Court of the State of California from the court's judgment entered in the above entitled case on May 23, 1941.

Dated: June 2, 1941.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[fol. 85] [File endorsement omitted]

IN SUPERIOR COURT OF SACRAMENTO COUNTY

[Title omitted]

NOTICE REQUESTING PREPARATION OF TRANSCRIPT—Filed June 6, 1941

To T. F. Patterson, County Clerk of the County of Sacramento, State of California:

Please take notice that *Standard Oil Company of California*, plaintiff in the above entitled action, has appealed from the court's judgment entered in the above entitled case on May 23, 1941.

You are further notified that said plaintiff requests that [fol. 86] a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate be made up and prepared.

Dated: June 4, 1941.

Pillsbury, Madison & Sutro, Attorneys for Plaintiff.

[fols. 87-89] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 90-107] IN SUPREME COURT OF CALIFORNIA

SACRAMENTO NO. 5493

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, Plaintiff, Appellant,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California, Defendant, Respondent

On Appeal from the Superior Court in and for the County of Sacramento

JUDGMENT

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered, it is ordered, adjudged, and decreed by the Court that the judgment of the Superior Court in and for the County of Sacramento, in the above entitled cause, be and the same is hereby affirmed.

Respondent to recover costs on appeal.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 29th day of November, 1941, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 30th day of December, A. D. 1941.

B. Grant Taylor, Clerk, by L. F. White, Deputy.
(Seal.)

[fol. 108] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA IN BANK

Sac. No. 5493

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, Plaintiff and Appellant,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California, Defendant and Respondent

OPINION—Filed Nov. 29, 1941

During the month of March of the present year the Standard Oil Company of California, plaintiff herein, sold

several thousand gallons of gasoline to the United States Army Post Exchanges located on recently acquired government reservations, not under the exclusive jurisdiction of the federal government, at Camp McQuaide, Watsonville, California, Campo, California, and Seeley, California. None of said post exchanges was, at any of the dates on which said sales were made, located on any United States reservation over which the federal government had exclusive jurisdiction to legislate on these sales of gasoline or other merchandise. Said post exchanges were organized and owned at all times herein mentioned, and were operated and did business under Army Regulations No. 210-65, of date June 29, 1929, and Army Regulations 210-65, C 3, of date March 9, 1940.

Plaintiff paid a tax on said sales amounting to the sum of $526.08 to the State of California. Said payment was made under protest and was accompanied by a verified written demand for the repayment to plaintiff of said sum on the ground that said tax was illegal for the reasons stated in said protest and demand. The reasons so stated were that said gasoline was sold to the United States Government or a department thereof for official use and was [fol. 109] therefore exempt from the tax under section 10 of the Motor Vehicle Fuel License Tax Act; and furthermore, that the State of California is without right or authority to impose a tax on gasoline sold to post exchanges since they are instruments and agencies of the federal government. The officials of the state refused to acquiesce in the demand of plaintiff, and no part of said sum of $526.08 has been repaid to plaintiff. Thereupon plaintiff instituted this action against the defendant, the Treasurer of the State of California, to recover said amount. A trial was had and judgment was rendered in favor of the defendant, and plaintiff has appealed therefrom.

There is no dispute as to the facts. The controversy between the parties hereto involves simply questions of law, and they may be briefly stated as follows: Has the State of California the right and power to impose such tax on gasoline sold to United States Army Post Exchanges; and if the state has the right to impose such a tax, have sales to army post exchanges been exempted from the payment thereof by section 10 of the Motor Vehicle Fuel License Tax Act?

This action in many of its essential features is like the case of People v. Standard Oil Company of California, 218 Cal. 123, 22 Pac. (2d) 2. That case arose out of sales of gasoline by the Standard Oil Company to United States post exchanges located within the Presidio military reservation at San Francisco. The Standard Oil Company in that case refused to pay the tax, and the action was brought to compel its payment. The tax in that case and the tax in the present case were levied and imposed under practically the same statute of this state. Our attention has not been called to any material change in the legal status of military post exchanges since the rendition of the de- [fol. 110] cision in that case. So what was said by this court in that case upon the questions involved in the present action would be most persuasive of the decision of those questions.

In that case it was contended by the Standard Oil Company that sales made to military post exchanges were exempt from the state tax by virtue of the provisions of section 10 of the state statute hereinbefore referred to. In reply to the contention that "a sale to the army post exchange is a sale to a department of the government of the United States for official use of said government," our former opinion held at page 126: "Manifestly these sales are neither to a 'department' of the government nor for official use. The gasoline was sold to the exchange for resale to certain classes of persons for their private consumption. We have no hesitation in concluding that the legislative intent was to include the sales in question in computing the tax. But these observations do not determine the cause."

The decision then passes to a consideration of the nature of army post exchanges and of the power of the state to tax sales made to such exchanges, and upon that question concludes at page 128: "From these and other observations that might be made, touching the nature of the organization of an army post exchange, we are of the opinion that it is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located and that it is not one of those agencies through which the federal government directly exercises its constitutional or sovereign power."

We further held in that opinion that the tax on such sales was collectible even though the sales were made within the territorial limits of the Presidio, over which the State of California had exclusive legislative jurisdic-
[fol. 111] tion. An appeal was taken to the Supreme Court of the United States, and the judgment of this court was reversed on the ground that the sales were made without the jurisdiction of the state and "within territory subject only to the control of the United States". [Standard Oil Company v. California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775.] No reference was made in the opinion of the United States Supreme Court to any question decided in our opinion except the one involving territorial jurisdiction over the place where the sales were made. That portion of our decision holding that a military post exchange was not an instrumentality or department of the federal government, and that sales of gasoline to it were subject to the statutes of this state, was unaffected by the decision of the Supreme Court of the United States and must stand as the latest expression of this court upon those two questions, which are the only questions involved in this appeal.

The conclusion at which we arrived in the Standard Oil Company case, as hereinbefore set forth and which was not considered or passed upon by the Supreme Court of the United States, finds support in the decisions of the federal courts and in those of the United States Court of Claims, although the cases considering that question are not without conflict.

For a reversal of the judgment herein in favor of the respondent, the appellant cites and relies upon the following cases: Dugan v. United States, 34 Ct. Cl. 458; Woog, Administrator v. United States, 48 Ct. Cl. 80; Post Exchange, 31st Infantry v. Keeney, Reg. No. 30,920, decided August 20, 1929, Supreme Court of the Philippine Islands; United States v. Query, 21 Fed. Supp. 784; United States v. Query, 37 Fed. Supp. 972; and United States v. Cordy, [fol. 112] 58 Fed. (2d) 1013.

It may be conceded that the Dugan and Woog cases support the contention of appellant, and the same may be said respecting the Keeney case from the Supreme Court of the Philippine Islands, although the last-mentioned case may have been overruled by the case of Thirty-First Infantry Post Exchange v. Posadas, 54 Phil. Rep. 866, herein-

after referred to. The cases of United States v. Query, 21 Fed. Supp. 784, and United States v. Cordy, supra, are readily distinguishable from our present case. While the earlier Query case was decided by a court composed of three judges and the questions involved therein were thoroughly and carefully considered, it involved the right of the State of South Carolina to tax a Civilian Conservation Corps camp exchange. Such a camp had its existence by virtue of congressional legislation and federal funds were used to pay the expense in connection with its conduct, operation and maintenance. As shown by our decision in the Standard Oil Company case, supra, an army post exchange "is not instituted by the aid of funds from the United States nor are its avails paid into the treasury. * * * Neither the government nor the officers of the post wherein the exchange is located are liable for its debts." [218 Cal. 128.] The case of United States v. Cordy, supra, involved the right of the State of Maryland to levy a tax upon the sale of gasoline to a "Y" military post exchange on a military reservation over which the State of Maryland had ceded exclusive jurisdiction to the United States Government. That case involved the precise point decided by the United States Supreme Court in Standard Oil Company v. California, supra. The later Query case, 37 Fed. Supp. 972, was also a decision by a court of three judges and unquestionably supports the position of appellant. It was decided [fol. 113] in March of this year. It contains an exhaustive review of the authorities bearing upon the legal status of army post exchanges and holds that they are federal instrumentalities and immune from state taxation.

As against these authorities in favor of the appellant, the respondent relies upon two decisions of the circuit court of appeal and one from the Supreme Court of the Philippine Islands. In the first of these cases, Keane v. United States 272 Fed. 577, Keane was charged with conspiracy to defraud the United States by padding invoices for meat sold by him to an army post exchange. He appealed from a judgment of conviction and the circuit court of appeal reversed the judgment, holding at page 588: "Clearly the post exchange described in the indictment in this case is not such a lawful department of Government. Therefore this post exchange is not such an institution as that a fraud upon the United States can arise or be involved in any

transaction concerning it, * * *" While this decision was by a divided court, it is not shown that any appeal was taken therefrom. Apparently the government was satisfied with the conclusion reached therein.

Pan-American Petroleum Corporation v. State of Alabama, 67 Fed. (2d) 590, a decision of the circuit court of appeal and the second case relied upon by respondent, involved the right of the State of Alabama to impose a tax upon gasoline sold to a military post exchange. After pointing out that the tax was not on the sale, but upon the withdrawal of the gasoline from storage, the court stated at page 596: "Furthermore, a post exchange is, of course, not the government; nor is it a department or instrumentality thereof. On the contrary, a post exchange is a voluntary, unincorporated, co-operative association of [fol. 114] army organizations in which all share as partners in the profits and losses. The government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to the post exchanges * * * are not exempt from the state excise taxes. People v. Standard Oil Co. (Cal. Sup.), 22 P. (2d) 2." A petition for a writ of certiorari to review this decision was denied. [291 U. S. 670.]

The third case relied upon by respondent in support of the judgment is the case of Thirty-First Infantry Post Exchange v. Posadas, supra. It involved the right to collect a tax levied by the local government upon sales made to army post exchanges and "ship's stores". [The latter are organized within the navy in the same manner and for the same purpose as post exchanges are established in the army.] The court sustained the tax in the following language: "We rule that an Army Post Exchange, although an agency within the United States Army cannot secure exemption from taxation for merchants who make sales to the Post Exchange." The United States Supreme Court denied a petition to review this decision by certiorari. [283 U. S. 839.] This decision would apparently overrule the case of Post Exchange, 31st Infantry v. Keeney, supra, decided by the Supreme Court of the Philippine Islands and relied upon by the appellant.

We do not find that the Supreme Court of the United States has ever directly passed upon the legal status of military post exchanges, yet the question has been before it

on three different occasions: First, in the Thirty-First Infantry Post Exchange v. Posadas, supra, when it declined to review the judgment of the Supreme Court of the Philippine Islands, involving a tax on merchandise sold to a post exchange; Second, in our own case of Standard [fol. 115] Oil Company v. California, supra, where it held the tax void because the same was made within territory over which this state had ceded full legislative authority to the United States, but declined to pass upon the legal status of an army post exchange, that is, whether it is or is not a department or instrumentality of the federal government; and Third, in the case of Pan-American Petroleum Corporation v. State of Alabama, supra, wherein the circuit court of appeal sustained a tax levied by the state upon sales of gasoline made to a post exchange.

In a very recent decision of the Board of Tax Appeals for the District of Columbia, in a proceeding entitled "Post Exchange, The Army War College v. District of Columbia," decided July 24, 1941, a tax assessed by the Assessor of the District of Columbia upon two automobiles belonging to said post exchange was sustained. After an extensive review of all the authorities cited above and many others, the board of tax appeals arrived at the following conclusion: "After giving consideration to the decisions, upon which the petitioner and respondent rely, and a study of the Army Regulations pertaining to post exchanges, the Board is of the opinion that the petitioner is not an agency, instrumentality or department of the United States, but is a voluntary cooperative association of army organizations in which all share as partners in the profits and losses, and in which the United States has neither a share in the profits, nor liability for the losses. The Board realizes that there are authorities opposed to this ruling, but believes that the reasoning of the decisions which support the Board's conclusion is more persuasive. That being so, it follows that the tax here involved was not erroneously collected by the District from the petitioner. * * *"

It seems to us after a study of the authorities upon the [fol. 116] question before us, that the great weight of authority is in favor of the ruling of the trial court, holding that an army post exchange is not an instrumentality or department of the federal government, but, on the other hand, "is an organization largely engaged in business of

a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located." [People v. Standard Oil Company of California, supra, at p. 128.]

Since the rendition of the opinion in the case of Standard Oil Company v. California, supra, holding a sale to a post exchange within a territory over which the state has ceded to the federal government full legislative authority, is immune from a state tax, Congress has enacted a statute which removes the immunity from taxes on sales made within a federal area. [54 U. S. Statutes p. 1059, 4 U. S. C. A. sec. 13 (a).] This change in the federal law, however, would not in any manner affect the decision in this case, as it is expressly alleged that none of the army post exchanges to which the plaintiff sold gasoline and on which it paid a tax, is located on United States military reservations, over which the federal government has exclusive jurisdiction to legislate.

For the reasons herein stated the judgment is affirmed.

Curtis, J.

We concur: Gibson, C. J.; Shenk, J.; Edmonds, J.; Carter, J.

I concur in the judgment: Houser, J.

[fol. 117] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

Petition for Appeal, Assignments of Error and Prayer for Reversal—Filed March 23, 1942

PETITION FOR APPEAL

Considering itself aggrieved by the final decision of the Supreme Court of the State of California in the above entitled cause, the plaintiff therein, Standard Oil Company of California, hereby prays that an appeal be allowed to the Supreme Court of the United States, herein, and for an order fixing the amount of the bond thereon.

Assignments of Error

And the said plaintiff, Standard Oil Company of California, assigns the following errors in the record and proceedings in the said cause:

1. The Supreme Court of the State of California erred in upholding the validity of the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, as amended by Stats. 1925, p. 659; Stats. 1927, p. 1308; Stats. 1929, pp. 112, [fol. 118] 1551; Stats. 1931, pp. 105, 1652, 2001, 2288; Stats. 1933, pp. 1249, 1631; Stats. 1935, pp. 1646, 1692, 1717, 1760; Stats. 1937, p. 2217; Stats. 1939, pp. 1714, 2222) when applied to sales of gasoline made to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and to the United States Army Post Exchange, Seeley, California.

2. The Supreme Court of the State of California erred in holding that sales of gasoline to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and to the United States Army Post Exchange, Seeley, California, are subject to excise taxes imposed by the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, as amended by Stats. 1925, p. 659; Stats. 1927, p. 1308; Stats. 1929, pp. 112, 1551; Stats. 1931, pp. 105, 1652, 2001, 2288; Stats. 1933, pp. 1249, 1631; Stats. 1935, pp. 1646, 1692, 1717, 1760; Stats. 1937, p. 2217; Stats. 1939, pp. 1714, 2222).

3. The Supreme Court of the State of California erred in holding that the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, the Eleventh Cavalry Post Exchange, Campo, California, and the United States Army Post Exchange, Seeley, California, are not instrumentalities of the Federal Government but are voluntarily unincorporated cooperative associations of army organizations largely engaged in business of a private nature.

4. The Supreme Court of the State of California erred in holding that sales of gasoline to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and to the United States Army Post Exchange, Seeley, California, are not sales to the Government of the United States

[fol. 119] or a department thereof for the official use of the Government.

5. The Supreme Court of the State of California erred in affirming the judgment of the Superior Court of the State of California, for the defendant.

PRAYER FOR REVERSAL

For which errors the plaintiff, Standard Oil Company of California, prays that the said judgment of the Supreme Court of the State of California, dated December 30, 1941, in the above entitled cause, be reversed, and that the judgment of the Superior Court of the State of California in the above entitled cause, in favor of the defendant, Charles G. Johnson, as Treasurer of the State of California, be reversed, and that the plaintiff be given judgment in the sum of five hundred twenty-six and eight hundredths dollars ($526.08), with interest thereon, and its costs.

Dated: March 21, 1942.

Felix D. Smith, Francis R. Kirkham, Sigvald Nielson, Frank J. Kockritz, Jr., Attorneys for Appellant.

[fol. 120] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 23, 1942

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of California on the 30th day of December, 1941, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, and prayer for reversal and statement as to jurisdiction, pursuant to the statute and rules of the Supreme Court of the United States in such case made and provided:

It is now here *Ordered* that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of California in the

above entitled cause, as provided by law, and it is further *Ordered* that the clerk of the Supreme Court of the State of California shall prepare and certify a transcript of the record, proceedings, and judgment in this cause and transmit the same to the Supreme Court of the United States, [fol. 121] so that he shall have the same in said court within sixty (60) days of this date.

And it is further *Ordered* that the security for costs on appeal be fixed in the sum of five hundred dollars ($500).

Dated: March 23, 1942.

Phil S. Gibson, Chief Justice of the Supreme Court of the State of California.

[fols. 122-127] Citation in usual form showing service on Earl Warren, filed March 23, 1942, omitted in printing.

[fols. 128-129] Cost Bond on Appeal for $500.00 approved and filed March 23, 1942, omitted in printing.

[fol. 130] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD—Filed March 24, 1942

It is hereby stipulated that the transcript of record to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include the following:

Complaint;
Answer;
Conclusions of Law;
Judgment of the Superior Court of the State of California;
Opinion of the Supreme Court of the State of California;
Judgment of the Supreme Court of the State of California;

Petition for Appeal, Assignments of Error and Prayer for Reversal;
Statement as to Jurisdiction;
Order Allowing Appeal;
Bond for Costs;
Citation; Proof of Service
[fol. 131] Notice under Rule 12, paragraph 2, and Proof of Service;
Appellee's Statement Urging that Court Take Jurisdiction; and
Stipulation as to Contents of Transcript of Record.
Dated: March 24, 1942.

Felix T. Smith, Francis R. Kirkham, Sigvald Nielson, Frank J. Kockritz, Jr., Attorneys for Appellant. Earl Warren, Attorney General of the State of California; H. H. Linney, Deputy Attorney General of the State of California; Adrian A. Kragen, Deputy Attorney General of the State of California, Attorneys for Appellee.

[fol. 132] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 133] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed April 8, 1942

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this court in this case are as follows:

1. The Supreme Court of the State of California erred in upholding the validity of the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, as amended by Stats. 1925, p. 659; Stats. 1927, p. 1308; Stats. 1929, pp. 112, 1551; Stats. 1931, pp. 105, 1652, 2001, 2288; Stats. 1933, pp. 1249, 1631; Stats. 1935, pp. 1646, 1692, 1717, 1760; Stats. 1937, p. 2217; Stats. 1939, pp. 1714, 2222) when applied to sales of gasoline made to the 250 Coast Artillery Post Ex-

change, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and to the United States Army Post Exchange, Seeley, California.

2. The Supreme Court of the State of California erred [fol. 134] in holding that sales of gasoline to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and to the United States Army Post Exchange, Seeley, California, are subject to excise taxes imposed by the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, as amended by Stats. 1925, p. 659; Stats. 1927, p. 1308; Stats. 1929, pp. 112, 1551; Stats. 1931, pp. 105, 1652, 2001, 2288; Stats. 1933, pp. 1249, 1631; Stats. 1935, pp. 1646, 1692, 1717, 1760; Stats. 1937, p. 2217; Stats. 1939, pp. 1714, 2222).

3. The Supreme Court of the State of California erred in holding that the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, the Eleventh Cavalry Post Exchange, Campo, California, and the United States Army Post Exchange, Seeley, California, are not instrumentalities of the Federal Government but are voluntarily unincorporated cooperative associations of army organizations largely engaged in business of a private nature.

4. The Supreme Court of the State of California erred in holding that sales of gasoline to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and to the United States Army Post Exchange, Seeley, California, are not sales to the Government of the United States or a department thereof for the official use of the Government.

5. The Supreme Court of the State of California erred in affirming the judgment of the Superior Court of the State of California, for the defendant.

The appellant further states that the whole of the record, as filed, is necessary for the consideration of the case, and that all parts of the record, as filed, are deemed neces- [fols. 135-138] sary to be printed except Army Regulations AR 210-65 and AR 210-65 C3, exhibits A and B to the complaint herein, pages 11 to 67, inclusive, of the record herein.

as filed, of which printed copies will be supplied by the appellant upon noting of probable jurisdiction by this court.

Dated: March 30, 1942.

Felix T. Smith, Francis R. Kirkham, S. Nielson, Frank J. Kockritz, Jr., Attorneys for Appellant.

Due service and receipt of a copy of the within statement of points to be relied upon and designation of the parts of the record to be printed is hereby acknowledged this 30 day of March, 1942.

Earl Warren, Attorney General of the State of California; H. H. Linney, Assistant Attorney General of the State of California; Adrian A. Kragen, Deputy Attorney General of *of* the State of California.

[fol. 138a] [File endorsement omitted.]

[fol. 139] SUPREME COURT OF THE UNITED STATES

ORDER POSTPONING FURTHER CONSIDERATION OF THE QUESTION OF JURISDICTION—April 14, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court in this case is postponed to the hearing of the case on the merits. The motion to advance is granted and the case is assigned for argument on Monday, May 4th, next.

Endorsed on cover: File No. 46,453. California Supreme Court. Term No. 1125. Standard Oil Company of California, Appellant, vs. Charles G. Johnson, as Treasurer of the State of California. Filed April 8, 1942, Term No. 1125 O. T. 1941.

[fol. 91] SUPREME COURT OF CALIFORNIA

CERTIFICATE

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, Plaintiff, Appellant,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California, Defendant, Respondent

Supplementing the certificate heretofore made by me to the record on appeal to the Supreme Court of the United States, in the above entitled cause,

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the judgment of the Supreme Court of California in said cause was pronounced by said court on November 29, 1941; that the opinion of the court was filed on that day but no formal judgment was made or entered; that said judgment became final at the end of the thirtieth day thereafter; that thereupon, and on December 30, 1941, the formal judgment and remittitur in said cause, appearing above my certificate of December 30, 1941, in said record, was prepared and entered in the judgment book of said court.

Witness my hand and the seal of the Court, affixed at my office, this 22d day of April, A. D. 1942.

B. Grant Taylor, Clerk of the Supreme Court of the State of California. (Seal.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1125

STANDARD OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

CHARLES G. JOHNSON, AS TREASURER OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

FELIX T. SMITH,
FRANCIS R. KIRKHAM,
SIGVALD NIELSON,
FRANK J. KOCKRITZ, JR.,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1125

STANDARD OIL COMPANY OF CALIFORNIA,
A CORPORATION,
Appellant,

vs.

CHARLES G. JOHNSON, AS TREASURER OF THE STATE OF CALIFORNIA.
Appellee.

STATEMENT AS TO JURISDICTION.

Statement of the Case.

During the month of March, 1941, appellant sold several thousand gallons of gasoline to United States Army Post Exchanges located in California on Government reservations not under the exclusive jurisdiction of the Federal Government. The State of California collected a gasoline tax from appellant in respect of these sales under the Motor Vehicle Fuel License Tax Act (*infra*, p. 3. Appellant paid the tax under protest and brought this suit in the Superior Court for the County of Sacramento to recover the amount thereof, alleging (1) that the sales of gasoline to the Army Post Exchanges were exempt under

Section 10 of the Act, which provides that the tax shall not apply,

> "* * * to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, * * *"

and (2) that if the Act is construed and applied to impose a tax upon such sales it is unconstitutional as imposing a burden upon instrumentalities or agencies of the United States and subjecting them to regulation beyond the power of the State (Complaint, Pars. VII and VIII, Tr. 6).[1]

The State of California filed an answer admitting the facts alleged in the complaint. The trial court gave judgment on the pleadings for appellee, holding that post exchanges are not instrumentalities or agencies of the United States Government. No opinion was rendered. A copy of the court's conclusions of law (Tr. 23-24) is appended hereto as Appendix A.

Upon appeal, the Supreme Court of the State of California affirmed the judgment of the Superior Court. The opinion of that court, a copy of which is appended hereto as Appendix B, is not yet officially reported. It is unofficially reported in 19 Advance California Reports 125, and 119 P. (2d) 329.

Statutory Provisions Sustaining Jurisdiction.

The statutory provision believed to sustain the jurisdiction of this Court is Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. 344(a), 861a).

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[1] References to the transcript are to the typewritten transcript of record upon which the case was reviewed by the Supreme Court of the State of California, and which is included in the transcript certified to this court.

Statute of the State Involved.

The statute of the state, the validity of which is involved, is the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, pp. 572, 573, 574, as amended by Cal. Stats. 1927, p. 1309; Cal. Stats. 1933, pp. 1636, 1637, and Cal. Stats. 1937, p. 2219). The material provisions of that act are as follows:

> "Sec. 3. A license tax is hereby imposed for the privilege of distributing, within the meaning of section 7 of this act, any motor vehicle fuel. Said license tax shall be according to or measured by the gallonage of motor vehicle fuel so distributed in this State and shall be at the rate of three cents for each gallon of such fuel refined, manufactured, produced, blended or compounded by such distributor in this State and so distributed by him in this State * * *."
>
> "Sec. 7. For the purposes of this Act all motor vehicle fuel sold, donated, consigned for sale, bartered or used shall be deemed to be distributed, * * *."
>
> "Sec. 10. The provisions of this act requiring the payment of license taxes shall not be held or construed to apply * * * to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, * * *."

Date of Judgment and of Application for Appeal.

The opinion of the Supreme Court of the State of California was filed November 29, 1941; its remittitur and judgment was filed December 30, 1941, on which day the judgment became final.

Rule XXX, sec. 1, of the Rules of the Supreme Court of the State of California;

Oakland v. *Pacific Coast Lumber etc. Co.*, 172 Cal. 332, 337;

Estate of Ross, 189 Cal. 317, 318.

The application for appeal was presented March 23, 1942.

Cases Believed to Sustain the Jurisdiction.

The cases believed to sustain the jurisdiction of this Court are:

Fiske v. *Kansas*, 274 U. S. 380, 385;
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282, 288-290;
Breisch v. *Central R. R. of N. J.*, 312 U. S. 484, 489-491;
State Tax Comm'n v. *Van Cott*, 306 U. S. 511;
Minnesota v. *National Tea Co.*, 309 U. S. 551;
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109, 120;
Tipton v. *Atchison Ry. Co.*, 298 U. S. 141, 151-155.

Raising the Federal Questions.

The complaint in the trial court alleged that the sales in respect of which the taxes were collected were made to United States Army Post Exchanges (Complaint, Par. IV, Tr. 2); that the post exchanges were organized, owned and operated in accordance with Army Regulations promulgated by the Secretary of War pursuant to the Act of July 15, 1870 (16 Stat. 319) as amended by the Act of March 1, 1875 (18 Stat. 337; Complaint, Par. VI, Tr. 5-6; copies of the Regulations were attached to and made a part of the complaint, Tr. 9-20). The complaint further alleged (Pars. VII and VIII, Tr. 6):

"VII

Said sales of gasoline to United States Army post exchanges are not subject to the motor vehicle fuel license tax because such sales were of motor vehicle fuel sold to the Government of the United States, or a department thereof, for official use of said government

and are, therefore, specifically exempted from the tax by section 10 of the Motor Vehicle Fuel License Tax Act.

VIII

Said sales of gasoline to United States Army post exchanges are not subject to the motor vehicle fuel license tax because such sales were made to instrumentalities and agencies of the United States. If said Motor Vehicle Fuel License Tax Act properly construed and applied purports to impose a tax upon sales to the United States Army post exchanges said act is unconstitutional and void in that it imposes a burden upon instrumentalities and agencies of the United States prohibited by the Constitution of the United States and subjects instrumentalities and agencies of the United States to regulation beyond the power of the State of California to impose."

Under California practice an appeal is taken by a notice of appeal (Tr. 27), and the questions to be reviewed are set forth in the briefs of the parties. Appellant's brief in the Supreme Court of California raised the Federal questions herein discussed, and the Supreme Court of California expressly considered and decided these questions (Opinion, Appendix B).

Statement of Grounds Upon Which It Is Contended the Questions Involved Are Substantial.

A. *The California Motor Vehicle Fuel License Tax Act as Construed and Applied in This Case is Unconstitutional.*

(1) *A state tax upon transactions of the United States Government or its instrumentalities is invalid.*

In upholding the validity of the Motor Vehicle Fuel License Tax Act as applied to the transactions involved in this case, the Supreme Court of the State of California held

that the State of California has the power to impose an excise tax upon the transactions of instrumentalities and agencies of the Federal Government. It is well settled that a state may not impose a tax upon the transactions of the United States Government or its instrumentalities and agencies.

See:

McCulloch v. *Maryland*, 4 Wheat. 316;
Osborn v. *United States Bank*, 9 Wheat. 738, 865;
Willcuts v. *Bunn*, 282 U. S. 216, 226-227;
Helvering v. *Therrell*, 303 U. S. 218, 223;
Helvering v. *Gerhardt*, 304 U. S. 405, 411, 413;
Alabama v. *King & Boozer*, 314 U. S. 1, 8-9.

It is submitted that the recent decision in *Alabama* v. *King & Boozer*, *supra*, which is the latest pronouncement of this court on this subject, sustains this doctrine. That case involved the imposition of the Alabama sales tax upon sales of lumber to cost-plus-a-fixed-fee contractors. Since the Supreme Court of Alabama had considered the tax as one imposed upon transactions this Court assumed that the true tax incidence was the sale to the Government contractor. The Government disclaimed any contention that the Constitution prohibited the tax because the tax was passed on economically as a part of the construction cost to the Government (314 U. S., 8). Instead, the contention of the Government was that the tax was invalid because it was laid in such manner that its legal incidence was upon the Government rather than upon its contractor, because the contractor "so acted for the Government as to place it in the role of a purchaser of the lumber" (314 U. S., 9). This court said (314 U. S., 9):

> "The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it."

It is thus clear that this recent case recognizes and reaffirms the rule that a State may not impose taxes upon the transactions of instrumentalities of the Federal Government. The fact that this Court held that cost-plus-a-fixed-fee contractors are not instrumentalities of the Federal Government, and therefore that the taxing act as construed and applied was not unconstitutional, in no way detracts from this conclusion.

(2) *The tax here involved was upon transactions of United States Army Post Exchanges.*

In contrast to the situation involved in the *King & Boozer* case, the tax in this case is imposed upon transactions of Government instrumentalities, the United States Army Post Exchanges. In *Standard Oil Co.* v. *California*, 291 U. S. 242, this court considered the same taxing Act as is here involved and expressly held that it imposes an excise tax UPON TRANSACTIONS. That case involved the question whether the State of California could constitutionally impose the tax upon sales of gasoline made within the territorial limits of the San Francisco Presidio. In determining the effect of the California Act, this Court held that it imposes "taxes in respect of sales and deliveries" and concluded that in operation it was a "tax upon transactions" (p. 244).[2]

(3) *United States Army Post Exchanges are Government Instrumentalities.*

United States Army Post Exchanges are organized, owned and operated in accordance with Army Regulations issued by the Secretary of War with the sanction of the

[2] The power of this court independently to determine the incidence of a state exaction when claims of Federal immunity are made is well settled. For a recent statement of the rule, see *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443-444.

President as Commander in Chief of the Army.[3] These regulations are issued pursuant to federal statutes,[4] and have the force of law.[5] They direct every step in the formation, ownership, and operation of the exchanges.[6]

The commanding officer of the post has the full responsibility for the operation of the post exchange. He is assisted by the post exchange council, consisting of the post exchange officer and the commanding officers of the unit members.[7] These men perform their duties, not as volunteers, but as a part of their official duties.[8] The members of the post exchange are companies or similar units stationed at the post, and not individual soldiers.[9] No part of the profits of the exchange can be distributed to any individual for personal or private use;[10] they may be used only for governmental purposes.[11]

Post exchanges are authorized to use Government supplies [12] and to occupy buildings constructed and maintained by the Federal Government and equipped with federal

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[3] Tr. pp. 5, 6, 21.

[4] 16 Stat. 319; 18 Stat. 337.

[5] *United States* v. *Query*, 37 F. Supp. 972, 975 (Aff'd. 121 F. (2d) 631; cert. den. — U. S. —; 62 Sup. Ct. 295);

Henry Woog, Administrator, v. *The United States*, 48 Ct. Cl. 80, 88, 89;
Thomas B. Dugan v. *The United States*, 34 Ct. Cl. 458.

See:

Smith v. *Whitney*, 116 U. S. 167, 181;
Gratjot v. *United States*, 45 U. S. 80, 117, 118;
F. T. Dooley Lumber Co. v. *United States*, 63 F. (2d) 384; cert. den. 290 U. S. 646.

[6] Tr. pp. 9-20.

[7] A. R. 210-65, par. 16 c, Tr. p. 9.

[8] *United States* v. *Query*, 37 F. Supp. 972, 974.

[9] A. R. 210-65, par. 8, Tr. p. 9.

[10] *Henry Woog, Administrator*, v. *The United States*, *supra*, pp. 87, 88.

[11] A. R. 210-65, par. 9, Tr. p. 9.

[12] A. R. 210-65, par. 59, Tr. p. 9.

funds;[13] their mail is carried by the Government free of charge;[14] their business messages are transmitted free of charge over telegraph and cable lines or radio owned and operated by the War Department;[15] their officers are entitled to the legal advice and services of the United States Attorney to protect the rights and interests of the exchanges.[16] Congress has periodically appropriated funds for the construction of equipment and maintenance of post exchange buildings.[17]

The President of the United States and the heads of the various departments of the United States, including the Attorney General, the Comptroller of the Treasury, the Comptroller General, the Postmaster General, the Secretary of War, the Secretary of the Navy, and the Commissioner of Internal Revenue, have in many instances held that post exchanges are federal instrumentalities. (See: *United States* v. *Query*, 37 F. Supp. 972, 976.)

In the light of the foregoing we submit that Army Post Exchanges clearly are instrumentalities of the Federal Government. As the court said in *Falls City Brewing Co.* v. *Reeves*, 40 F. Supp. 35, 39-40:

> "There can be no real doubt but that the Post Exchange as it is presently operated under army regulations, promotes in a large measure the welfare of the military personnel and that except for such operations the Government would itself be called upon to supply such facilities. Considered in this light it is certainly a

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[13] *Falls City Brewing Co.* v. *Reeves*, 40 F. Supp. 35, 39.

[14] A. R. 210-65, par. 73, Tr. p. 9.

[15] *United States* v. *Query*, 37 F. Supp. 972, 974.

[16] A. R. 210-65, par. 81 d, Tr. p. 9.

[17] 32 Stat. 937, 938; 33 Stat. 270; 33 Stat. 836; 34 Stat. 253, 1169; 35 Stat. 119, 516, 744; 36 Stat. 255, 1050; 37 Stat. 582, 619, 715; 38 Stat. 364, 1076; 39 Stat. 636; 40 Stat. 56, 195, 363, 479, 830, 862, 1029; 41 Stat. 118, 963, 1184; 42 Stat. 83, 719, 1056, 1167, 1380; 43 Stat. 480, 711, 895; 44 Stat. 190, 256, 1108; 45 Stat. 49, 329, 1352.

subordinate or auxiliary agency and falls easily within the accepted definition of an instrumentality of the United States."

The following cases have held that post exchanges are Government instrumentalities:

United States v. *Query*, 37 F. Supp. 972; affirmed 121 F. (2d) 631; cert. den. — U. S. —; 62 Sup. Ct. 295;

Falls City Brewing Co. v. *Reeves*, 40 F. Supp. 35 supra;

Henry Woog, Administrator, v. *The United States*, 48 Ct. Cl. 80, 88-89;

Thomas B. Duggan v. *The United States*, 34 Ct. Cl. 458;

Post Exchange, 31st Infantry v. *Grover C. Keeney*, (Reg. No. 30,920, Aug. 20, 1929, Supreme Court of the Philippine Islands).

Other cases have reached a contrary result:

Pan American Petroleum Corp. v. *State of Alabama*, 67 F. (2d) 590;

Thirty-first Infantry Post Exchange v. *Posadas*, 54 Phil. Rep. 866;

People v. *Standard Oil Co.*, 218 Cal. 123;

Keane v. *United States*, 272 Fed. 577.

In the instant case, the California Supreme Court relied upon the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Keane* case, last above cited. That case, decided in 1921, was not followed by the same court in its recent decision in *United States* v. *Query*, 121 F. (2d) 631, holding that post exchanges are instrumentalities of the Federal Government.

This Court has never ruled on the question. Certiorari was denied, however, in *United States* v. *Query*, supra (November 17, 1941, — U. S. —, 62 Sup. Ct. 295). Cer-

tiorari was also denied in *Thirty-first Infantry Post Exchange* v. *Posadas*, supra (283 U. S. 839), where the court reached a conclusion contrary to that reached in the *Query* case.

We respectfully submit that the federal questions presented on this appeal clearly are substantial. They are, moreover, questions of exceptional public importance at the present time. The activities of post exchanges under the present emergency are rapidly increasing. These activities raise questions of liability under the many excise tax statutes of the various States. While the amount involved in this case is nominal, the decision herein will be controlling in the disposition of other pending cases involving many thousands of dollars. The question whether post exchanges are instrumentalities of the United States is also of unusual importance at the present time because of its bearing upon recent legislation of Congress relating to state sales, use and income taxes. The Act of October 9, 1940, the so-called Buck Act (54 Stats. 1059, 4 U. S. C. 15),[18] specifically exempts from its provisions the transactions of "the United States or any instrumentalities thereof." The question whether post exchanges are Government instrumentalities must, therefore, be determined before the problems associated with this Act can be set at rest. The need of a clarifying decision is strikingly emphasized by the fact that

[18] This Act provides that no person shall be relieved of liability for payment of any State sales or use tax on the ground that the sale or use with respect to which the tax is levied occurred within an area over which the Federal Government has exclusive jurisdiction (like the Presidio of San Francisco involved in *Standard Oil Co.* v. *California*, 291 U. S. 242), and that no person shall be relieved of liability from state income tax by reason of his residing within or receiving income from transactions occurring or services performed within such area. The Act specifically exempts the transactions of the United States and any instrumentality thereof.

Congress, in passing this legislation, was itself uncertain as to the character of post exchanges.[19]

With the law in its present unsettled condition, confusion and uncertainty exist with respect to the obligations of taxpayers and of state taxing officials under numerous taxing acts of the State of California and of other states.

B. *The Supreme Court of California, in Holding That Section 10 of the California Motor Vehicle Fuel License Tax Act Does Not Exempt Sales of Gasoline to United States Army Post Exchanges, Based Its Decision Upon an Erroneous Ruling as to Federal Law. This Court Has Power to and Should Correct This Erroneous Decision of an Important Federal Question.*

The question whether section 10 of the California Act by its terms exempts taxes on sales to Army Post Exchanges is, in the ultimate, a question of state law. The California Supreme Court in this case, however, based its ruling as to the meaning of the statute ENTIRELY upon its

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[19] The committee reports indicate that Congress did not wish to characterize post exchanges as Government instrumentalities or otherwise without a decision of this court. We quote from "Application of State Sales, Use, and Income Taxes to Transactions in Federal Areas" (Senate Report dated May 16, 1940, to accompany H. R. 6687, pp. 3-4):

"* * * tangible personal property purchased from a commissary or ship's store by an Army or Naval officer or other person so permitted to make purchases from such commissary or ship's store, is exempt from the State sales or use tax since the commissary or ship's store is an instrumentality of the United States and the purchaser is an authorized purchaser. If voluntary unincorporated organizations of Army and Navy personnel, such as post exchanges, are held by the courts to be instrumentalities of the United States, the same rule will apply to similar purchases from such organizations; but if they are held not to be such instrumentalities, property so purchased from them will be subject to the State sales or use tax in the same manner and to the same extent as if such purchase was made outside a Federal area. It may also be noted at this point that if a post exchange is not such an instrumentality, it will also be subject to the State income taxes by virtue of section 2 of the committee amendment."

decision of the federal question whether post exchanges are Government instrumentalities. That is to say, in so far as its decision involved the construction of the statute, the court held that section 10 exempts sales to "instrumentalities of the United States," and then, having so construed the statute, turned its ruling entirely upon its decision of the question whether post exchanges are Federal instrumentalities UNDER THE APPLICABLE PROVISIONS OF FEDERAL LAW. Its determination of this question depended upon the construction and application of federal statutes,[20] the Army Regulations issued thereunder,[21] and the decisions of the federal courts construing these statutes and regulations. Among other things, the court said (Appendix B, pp. 22, 23):

> "We do not find that the Supreme Court of the United States has ever directly passed upon the legal status of military post exchanges, yet the question has been before it on three different occasions: * * *
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> * * * * * * *
>
> It seems to us after a study of the authorities upon the question before us, that the great weight of authority is in favor of the ruling of the trial court, holding that an army post exchange is not an instrumentality or department of the federal government, but, on the other hand, 'is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located.'"

It is thus clear that the Supreme Court of California, in so far as it held inapplicable the exemption provided in section 10, was applying "federal law * * * to a solution of a state's problems" (*Breisch* v. *Central R. R. of*

[20] 16 Stat. 319, 18 Stat. 337, supra, p. 8.

[21] Supra, pp. 7 to 9.

N. J., 312 U. S. 484, 491), and that its decision depends "altogether on a misconception of federal law" (Id., p. 491).

It is settled that in these circumstances this Court has power to review and to decide the federal question upon which the decision of the state court was based, and thereafter to remand the case for such further action as may be deemed appropriate by the state court.

Breisch v. *Central R. R. of N. J.*, supra;
State Tax Comm'n v. *Van Cott*, 306 U. S. 511;
Minnesota v. *National Tea Co.*, 309 U. S. 551;
Tipton v. *Atchison Ry. Co.*, 298 U. S. 141, 151-155;
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109, 120.

Conclusion.

We respectfully submit that the federal questions involved are substantial and are of exceptional public importance; that this Court has jurisdiction of the appeal.

Dated: March 23, 1942.

Respectfully submitted,

FELIX T. SMITH,
FRANCIS R. KIRKHAM,
SIGVALD NIELSON,
FRANK J. KOCKRITZ, JR.,
Counsel for Appellant.

EXHIBIT A.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO.

No. 63124—Dept. 3.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, *Plaintiff*,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California, *Defendant*.

Conclusions of Law.

This cause came on regularly for trial on the 5th day of May, 1941, before this court, plaintiff being represented by Messrs. Pillsbury, Madison & Sutro, and defendant being represented by Earl Warren, Attorney General of the State of California, and H. H. Linney and Adrian A. Kragen, deputies attorney general; and all of the facts having been admitted and the evidence being closed, and the court being fully advised in the premises and having rendered its decision, now makes its conclusions of law.

From the facts as appearing by the pleadings of the parties herein filed, the Court makes the following its

Conclusions of Law.

I.

That Post Exchanges organized under the provisions of Army Regulations No. 210-65 and No. 21-65C3, as well as amendments to said regulations, are not instrumentalities of the United States Government.

II.

That Post Exchanges organized under the provisions of Army Regulations No. 210-65 and No. 210-65C3, as well as

amendments to said regulations, are not agencies of the United States Government.

III.

That a sale of motor vehicle fuel to a Post Exchange is not a sale to the Government of the United States or any department thereof for official use of said government within the meaning of section 10 of the Motor Vehicle Fuel License Tax Act.

IV.

That plaintiff is not entitled to judgment in the sum of $526.08, nor in any other amount, and defendant is entitled to judgment for his costs of court herein incurred.

MALCOLM C. GLENN,
Judge of the Superior Court.

EXHIBIT B.

Endorsed: Filed Nov. 29, 1941. B. Grant Taylor, Clerk, by W., S. F. Deputy.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA.

IN BANK.

Sac. No. 5493.

STANDARD OIL COMPANY OF CALIFORNIA, a Corporation, *Plaintiff and Appellant,*

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California, *Defendant and Respondent.*

During the month of March of the present year the Standard Oil Company of California, plaintiff herein, sold several thousand gallons of gasoline to the United States Army Post Exchanges located on recently acquired govern-

ment reservations, not under the exclusive jurisdiction of the federal government, at Camp McQuaide, Watsonville, California, Campo, California, and Seeley, California. None of said post exchanges was, at any of the dates on which said sales were made, located on any United States reservation over which the federal government had exclusive jurisdiction to legislate on these sales of gasoline or other merchandise. Said post exchanges were organized and owned at all times herein mentioned, and were operated and did business under Army Regulations No. 210-65, of date June 29, 1929, and Army Regulations 210-65, C 3, of date March 9, 1940.

Plaintiff paid a tax on said sales amounting to the sum of $526.08 to the State of California. Said payment was made under protest and was accompanied by a verified written demand for the repayment to plaintiff of said sum on the ground that said tax was illegal for the reasons stated in said protest and demand. The reasons so stated were that said gasoline was sold to the United States Government or a department thereof for official use and was therefore exempt from the tax under section 10 of the Motor Vehicle Fuel License Tax Act; and furthermore, that the State of California is without right or authority to impose a tax on gasoline sold to post exchanges since they are instruments and agencies of the federal government. The officials of the state refused to acquiesce in the demand of plaintiff, and no part of said sum of $526.08 has been repaid to plaintiff. Thereupon plaintiff instituted this action against the defendant, the Treasurer of the State of California, to recover said amount. A trial was had and judgment was rendered in favor of the defendant, and plaintiff has appealed therefrom.

There is no dispute as to the facts. The controversy between the parties hereto involves simply questions of law, and they may be briefly stated as follows: Has the State of California the right and power to impose such tax on gasoline sold to the United States Army Post Exchanges; and if the state has the right to impose such a tax, have sales to army post exchanges been exempted from the payment thereof by section 10 of the Motor Vehicle Fuel License Tax Act?

This action in many of its essential features is like the case of People *v.* Standard Oil Company of California, 218 Cal. 123, 22 Pac. (2d) 2. That case arose out of sales of gasoline by the Standard Oil Company to United States post exchanges located within the Presidio military reservation at San Francisco. The Standard Oil Company in that case refused to pay the tax, and the action was brought to compel its payment. The tax in that case and the tax in the present case were levied and imposed under practically the same statute of this state. Our attention has not been called to any material change in the legal status of military post exchanges since the rendition of the decision in that case. So what was said by this court in that case upon the questions involved in the present action would be most persuasive of the decision of those questions.

In that case it was contended by the Standard Oil Company that sales made to military post exchanges were exempt from the state tax by virtue of the provisions of section 10 of the state statute hereinbefore referred to. In reply to the contention that "a sale to the army post exchange is a sale to a department of the government of the United States for official use of said government," our former opinion held at page 126: "Manifestly these sales are neither to a 'department' of the government nor for official use. The gasoline was sold to the exchange for resale to certain classes of persons for their private consumption. We have no hesitation in concluding that the legislative intent was to include the sales in question in computing the tax. But these observations do not determine the cause."

The decision then passes to a consideration of the nature of army post exchanges and of the power of the state to tax sales made to such exchanges, and upon that question concludes at page 128: "From these and other observations that might be made, touching the nature of the organization of an army post exchange, we are of the opinion that it is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located and that it is not one of those agencies through

which the federal government directly exercises its constitutional or sovereign power."

We further held in that opinion that the tax on such sales was collectible even though the sales were made within the territorial limits of the Presidio, over which the State of California had exclusive legislative jurisdiction. An appeal was taken to the Supreme Court of the United States, and the judgment of this court was reversed on the ground that the sales were made without the jurisdiction of the state and "within territory subject only to the control of the United States". [Standard Oil Company *v.* California, 291 U. S. 242, 54 S. Ct. 381, 78 L. Ed. 775.] No reference was made in the opinion of the United States Supreme Court to any question decided in our opinion except the one involving territorial jurisdiction over the place where the sales were made. That portion of our decision holding that a military post exchange was not an instrumentality or department of the federal government, and that sales of gasoline to it were subject to the statutes of this state, was unaffected by the decision of the Supreme Court of the United States and must stand as the latest expression of this court upon those two questions, which are the only questions involved in this appeal.

The conclusion at which we arrived in the Standard Oil Company case, as hereinbefore set forth and which was not considered or passed upon by the Supreme Court of the United States, finds support in the decisions of the federal courts and in those of the United States Court of Claims, although the cases considering that question are not without conflict.

For a reversal of the judgment herein in favor of the respondent, the appellant cites and relies upon the following cases: Dugan *v.* United States, 34 Ct. Cl. 458; Woog, Administrator *v.* United States, 48 Ct. Cl. 80; Post Exchange, 31st Infantry *v.* Keeney, Reg. No. 30,920, decided August 20, 1929, Supreme Court of the Philippine Islands; United States *v.* Query, 21 Fed. Supp. 784; United States *v.* Query, 37 Fed. Supp. 972; and United States *v.* Cordy, 58 Fed. (2d) 1013.

It may be conceded that the Dugan and Woog cases support the contention of appellant, and the same may be said

respecting the Keeney case from the Supreme Court of the Philippine Islands, although the last-mentioned case may have been overruled by the case of Thirty-First Infantry Post Exchange *v.* Posadas, 54 Phil. Rep. 866, hereinafter referred to. The cases of United States *v.* Query, 21 Fed. Supp. 784, and United States *v.* Cordy, supra, are readily distinguishable from our present case. While the earlier Query case was decided by a court composed of three judges and the questions involved therein were thoroughly and carefully considered, it involved the right of the State of South Carolina to tax a Civilian Conservation Corps camp exchange. Such a camp had its existence by virtue of congressional legislation and federal funds were used to pay the expense in connection with its conduct, operation and maintenance. As shown by our decision in the Standard Oil Company case, supra, an army post exchange, "is not instituted by the aid of funds from the United States nor are its avails paid into the treasury. * * * Neither the government nor the officers of the post wherein the exchange is located are liable for its debts." [218 Cal. 128.] The case of United States *v.* Cordy, supra, involved the right of the State of Maryland to levy a tax upon the sale of gasoline to a "Y" military post exchange on a military reservation over which the State of Maryland had ceded exclusive jurisdiction to the United States Government. That case involved the precise point decided by the United States Supreme Court in Standard Oil Company *v.* California, supra. The later Query case, 37 Fed. Supp. 972, was also a decision by a court of three judges and unquestionably supports the position of appellant. It was decided in March of this year. It contains an exhaustive review of the authorities bearing upon the legal status of army post exchanges and holds that they are federal instrumentalities and immune from state taxation.

As against these authorities in favor of the appellant, the respondent relies upon two decisions of the circuit court of appeal and one from the Supreme Court of the Philippine Islands. In the first of these cases, Keane *v.* United States 272 Fed. 577, Keane was charged with conspiracy to defraud the United States by padding invoices for meat sold by him to an army post exchange. He ap-

pealed from a judgment of conviction and the circuit court of appeal reversed the judgment, holding at page 588: "Clearly the post exchange described in the indictment in this case is not such a lawful department of Government. Therefore this post exchange is not such an institution as that a fraud upon the United States can rise or be involved in any transaction concerning it, * * *" While this decision was by a divided court, it is not shown that any appeal was taken therefrom. Apparently the government was satisfied with the conclusion reached therein.

Pan-American Petroleum Corporation *v.* State of Alabama, 67 Fed. (2d) 590, a decision of the circuit court of appeal and the second case relied upon by respondent, involved the right of the State of Alabama to impose a tax upon gasoline sold to a military post exchange. After pointing out that the tax was not on the sale, but upon the withdrawal of the gasoline from storage, the court stated at page 596: "Furthermore, a post exchange is, of course, not the government; nor is it a department or instrumentality thereof. On the contrary, a post exchange is a voluntary, unincorporated, co-operative association of army organizations in which all share as partners in the profits and losses. The government has no share in the profits, and is not bound by the losses. We are therefore of opinion that sales made by appellant to the post exchanges * * * are not exempt from the state excise taxes. People *v.* Standard Oil Co. (Cal. Sup.), 22 P. (2d) 2." A petition for a writ of certiorari to review this decision was denied. [291 U. S. 670.]

The third case relied upon by respondent in support of the judgment is the case of Thirty-First Infantry Post Exchange *v.* Posadas, supra. It involved the right to collect a tax levied by the local government upon sales made to army post exchanges and "ship's stores". [The latter are organized within the navy in the same manner and for the same purpose as post exchanges are established in the army.] The court sustained the tax in the following language: "We rule that an Army Post Exchange, although an agency within the United States Army cannot secure exemption from taxation for merchants who make sales to the Post Exchange." The United States Supreme Court

denied a petition to review this decision by certiorari. [283 U. S. 839.] This decision would apparently overrule the case of Post Exchange, 31st Infantry *v.* Keeney, supra, decided by the Supreme Court of the Philippine Islands and relied upon by the appellant.

We do not find that the Supreme Court of the United States has ever directly passed upon the legal status of military post exchanges, yet the question has been before it on three different occasions: First, in the Thirty-First Infantry Post Exchange *v.* Posadas, supra, when it declined to review the judgment of the Supreme Court of the Philippine Islands, involving a tax on merchandise sold to a post exchange; Second, in our own case of Standard Oil Company *v.* California, supra, where it held the tax void because the same was made within territory over which this state had ceded full legislative authority to the United States, but declined to pass upon the legal status of an army post exchange, that is, whether it is or is not a department or instrumentality of the federal government; and Third; in the case of Pan-American Petroleum Corporation *v.* State of Alabama, supra, wherein the circuit court of appeal sustained a tax levied by the state upon sales of gasoline made to a post exchange.

In a very recent decision of the Board of Tax Appeals for the District of Columbia, in a proceeding entitled "Post Exchange, The Army War College *v.* District of Columbia," decided July 24, 1941, a tax assessed by the Assessor of the District of Columbia upon two automobiles belonging to said post exchange was sustained. After an extensive review of all the authorities cited above and many others, the board of tax appeals arrived at the following conclusion: "After giving consideration to the decisions, upon which the petitioner and respondent rely, and a study of the Army Regulations pertaining to post exchanges, the Board is of the opinion that the petitioner is not an agency, instrumentality or department of the United States, but is a voluntary cooperative association of army organizations in which all share as partners in the profits and losses, and in which the United States has neither a share in the profits, nor liability for the losses. The Board realizes that there are authorities opposed to this ruling, but believes that the

reasoning of the decisions which support the Board's conclusion is more persuasive. That being so, it follows that the tax here involved was not erroneously collected by the District from the petitioner. * * *"

It seems to us after a study of the authorities upon the question before us, that the great weight of authority is in favor of the ruling of the trial court, holding that an army post exchange is not an instrumentality or department of the federal government, but, on the other hand, "is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located." [People *v.* Standard Oil Company of California, supra, at p. 128.]

Since the rendition of the opinion in the case of Standard Oil Company *v.* California, supra, holding a sale to a post exchange within a territory over which the state has ceded to the federal government full legislative authority, is immune from a state tax, Congress has enacted a statute which removes the immunity from taxes on sales made within a federal area. [54 U. S. Statutes p. 1059, 4 U. S. C. A. sec. 13 (a).] This change in the federal law, however, would not in any manner affect the decision in this case, as it is expressly alleged that none of the army post exchanges to which the plaintiff sold gasoline and on which it paid a tax, is located on United States military reservations, over which the federal government has exclusive jurisdiction to legislate.

For the reasons herein stated the judgment is affirmed.

CURTIS, J.

We concur:

GIBSON, C. J.
SHENK, J.
EDMONDS, J.
CARTER, J.

I concur in the judgment:

HOUSER, J.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1125

STANDARD OIL COMPANY OF CALIFORNIA,
A CORPORATION,
Appellant,

vs.

CHARLES G. JOHNSON, STATE TREASURER OF THE STATE OF CALIFORNIA,
Appellee.

APPELLEE'S STATEMENT URGING THAT THE COURT TAKE JURISDICTION.

Appellee has read appellant's statement of jurisdiction for appeal of the above-entitled cause to the Supreme Court of the United States and desires to join in such statement. Although appellee believes that the decision of the Supreme Court of the State of California is correct, appellee believes that the decision concerned a substantial Federal question proper for review by the Supreme Court of the United States.

The particular problem of the status of post exchanges is now causing great difficulty in the administration of various statutes of the State of California and appellee believes the same is true in other states. Although there has always been considerable confusion in regard to this matter, the great expansion in number and size of post

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exchanges has resulted in near chaos in the administration of statutes, such as, sales, use and gasoline taxes and motor vehicle regulation. Subsequent to the decision of the Supreme Court of the State of California, the Attorney General of California has endeavored to obtain the cooperation of the post exchanges located in California in the administration of the statutes of this State on the basis of that decision. The officers attached to the Judge Advocate General's staff stationed in this State have informed the Attorney General that they do not regard the decision of the Supreme Court of the State of California as controlling and post exchanges have therefore refused to follow said decision in its application to the various statutes. Unless the Supreme Court of the United States makes a determination whether post exchanges are instrumentalities of the Federal Government this difficult situation will continue and inevitably numerous suits will continue to be instituted throughout the various States directed toward an effort to obtain such a determination. Appellee, for the reasons stated above, urges that the Supreme Court of the United States take jurisdiction of this question.

Dated: March 21, 1942.

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1125

STANDARD OIL COMPANY OF CALIFORNIA (a corporation),

Appellant,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California,

Appellee.

MOTION OF APPELLEE TO ADVANCE CAUSE UPON CALENDAR.

EARL WARREN,
Attorney General of the State of California,
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State Building, San Francisco, California,
Counsel for Appellee.

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No.

STANDARD OIL COMPANY OF CALIFORNIA (a corporation),
Appellant,

vs.

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Appellee.

MOTION OF APPELLEE TO ADVANCE CAUSE UPON CALENDAR.

Comes now the Appellee in the above-entitled cause and moves that this case be advanced for early hearing, and in support of his motion makes the following brief statement of the matter involved and the reasons relied upon for the advancement:

Appellant brought this action in the Superior Court of the State of California to recover gasoline taxes levied under the California Motor Vehicle Fuel License Tax Act in respect of sales of gasoline to United States Army post exchanges located in California on government reservations not under the exclusive jurisdiction

of the Federal Government. Both the Superior Court of the State of California and the Supreme Court of the State of California have held that the tax was properly levied for the reason that the post exchanges were not instrumentalities of the Federal Government.

The reasons relied upon for advancement are that the matter is one of extreme importance to the post exchanges, gasoline distributors, and to the taxing authorities of California and other states of the Union. With the present expansion in number and size of the post exchanges throughout the country, the amount of their purchases both of gasoline and of all types of commodities has increased tremendously. The post exchanges have taken the position that they are instrumentalities of the Federal Government based on the holding of the United States Circuit Court of Appeals for the Fourth Circuit in *Query v. United States,* 121 Fed. (2d) 631, cert. den. ..... U. S. ....., 62 Sup. Ct. 295; and that a purchase by them is therefore not subject to the imposition of the California motor vehicle fuel license tax. The taxing officials of the State of California on the other hand are bound to follow the decision of the Supreme Court of California in the instant case. In order properly to protect the finances of the post exchange, to enable distributors to be reimbursed for the amount expended for taxes, and to enable the State of California to conduct an orderly administration of its taxing system, it is essential that the problem be determined at the earliest possible date.

A solution of this problem will also determine other taxing problems incident to the operation of post exchanges, especially those which arise by reason of the

language of the so-called "Buck Act" (Public No. 819, 76th Congress), specifically excluding from its provisions sales by instrumentalities of the Federal Government. We understand that some post exchanges making such sales are collecting sales tax and impounding the money but that others are making no collection at all. If this cause is determined at an early date the problem incident to the handling of such transactions will be materially lessened and the difficulty of adjustments between the post exchanges and the State taxing authorities will be made possible of equitable solution.

Wherefore, Appellee prays that the case be advanced upon the calendar and assigned for hearing at an early date.

Dated, San Francisco, California,
April 8, 1942.

Respectfully submitted,

EARL WARREN,
Attorney General of the State of California,

H. H. LINNEY,
Assistant Attorney General of the State of California,

ADRIAN A. KRAGEN,
Deputy Attorney General of the State of California,

Counsel for Appellee.

Appellant concurs in the above motion and waives all notice thereof.

Dated, San Francisco, California,
April 8, 1942.

Felix T. Smith
Francis R. Kirkham
Sigvald Nielson

Counsel for Appellant

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1941

No. 1125

STANDARD OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California,
Appellee.

Appeal from the Supreme Court of the State of California.

BRIEF FOR APPELLANT.

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OCTOBER TERM, 1941

No. 1125

STANDARD OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

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Appellee.

Appeal from the Supreme Court of the State of California.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of California (R. 76) is reported at 19 Advance California Reports 125; 119 P. (2d) 329. No opinion was rendered by the trial court; its conclusions of law and judgment are at R. 73, 74.

JURISDICTION.

The judgment of the Supreme Court of California became final on December 30, 1941, and was entered on that

day (Supplemental Certificate of the Clerk of the Supreme Court of California, R. 90). The appeal was allowed March 23, 1942 (R. 85-86). This Court has jurisdiction under section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U.S.C. 344(a), 861a).

The order postponing the question of the jurisdiction of this Court to the hearing on the merits (R. 89) indicates that when the jurisdictional statement was considered, the Court might have doubted the timeliness of the appeal. This doubt, if it existed, probably arose from the form of the Clerk's certificate appearing at R. 76. This certificate recites that

> "the foregoing is a true copy of an original judgment *entered*[1] in the above entitled cause on the 29th day of November, 1941, * * *."

This certificate is in traditional form but is misleading when read with section 8(a) of the Act of February 13, 1925, which provides:

> "That no * * * appeal * * * shall be allowed * * * unless application therefor be duly made within three months after the *entry* of such judgment or decree, * * *."

Under California law and practice the certificate should read,

> "the foregoing is a true copy of an original judgment pronounced [*not* "entered"] in the above entitled cause on the 29th day of November, 1941."

To clarify the record, appellant obtained a certificate from the Clerk of the Supreme Court of California (R.

[1]Italics throughout this brief are ours.

90). This points out that the judgment was "pronounced" on November 29, 1941, but did not become final and was not "entered" until December 30, 1941. Under these circumstances the appeal is timely (*Puget Sound Co. v. King County*, 264 U.S. 22).

The California law and practice which produced the above ambiguity in the record and which required the filing of the supplemental certificate is as follows:

The judgment in this case was pronounced by the Supreme Court of California in bank. Rule XXX, section 1, of the Rules of the Supreme Court of California provides:

> "Unless otherwise specially ordered, or a rehearing be granted, judgments of the Supreme Court in bank become final at the end of the thirtieth day after the date of pronouncement."[2]

Under this rule a judgment of the court in bank is merely "pronounced" on the day the decision is rendered and the opinion filed. During the following thirty-day period the judgment is tentative and may be modified by the court on its own motion or on the motion of the parties. At the expiration of thirty days the judgment becomes final.[3]. Thereupon, the formal judgment of the court is for the first time prepared and entered in the judgment book of the court (Supplemental Certificate, R. 90).

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[2]This rule was promulgated by the Judicial Council of California, established by the Constitution of that State (Art. VI, sec. 1a). The rules of the Judicial Council have "the force of positive law" (*Helbush v. Helbush*, 209 Cal. 758, 763; *Isenberg v. Superior Court of L. A. Co.*, 39 Cal. App. (2d) 106, 108-109).

[3]Rule XXX, sec. 1, Rules of the Supreme Court of California; *Estate of Ross*, 189 Cal. 317, 318.

The opinion of the Supreme Court of California herein was filed on November 29 (R. 76) and the last paragraph reads (R. 83):

> "For the reasons herein stated the judgment is affirmed."

Under the law of California this constituted the "pronouncement" of the judgment. On December 30, 1941, the judgment so pronounced became final (Rule XXX, supra) and was prepared and "entered" (Supplemental Certificate, R. 90). The appeal herein, allowed on March 23, 1942 (R. 85-86), was applied for "within three months after the entry of such judgment or decree" (sec. 8(a), Act of February 13, 1925).

If doubt remained it would be dispelled by section 237 (a) and (b) of the Judicial Code, providing that this Court may review, either on appeal or certiorari, "a final judgment or decree" of a state court. Since judgments of the Supreme Court of California do not become final until thirty days after their pronouncement, an appeal or application for certiorari during this thirty-day period would be premature. When section 8(a) of the Act of February 13, 1925, is read, as it must be, with section 237 (a) and (b) of the Judicial Code, it is clear that section 8(a) means that no appeal or writ of certiorari shall be allowed or entertained unless application therefor be made within three months of the entry of the *final* judgment or decree, that is, the *reviewable* judgment or decree.

STATUTE INVOLVED.

The relevant provisions of the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, pp. 572, 573, 574, as amended by Cal. Stats. 1925, p. 660; Cal. Stats. 1927, p. 1309; Cal. Stats. 1931, p. 113; Cal. Stats. 1933, pp. 1636, 1637, 1638, 1639; Cal. Stats. 1935, pp. 1646, 1696, and Cal. Stats. 1937, p. 2219) are set out in Appendix A.

STATEMENT OF THE CASE.

In March, 1941, appellant sold gasoline to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and to the United States Army Post Exchange, Seeley, California (R. 2, 72). No one of these Post Exchanges is located on a Government reservation over which the Federal Government has exclusive jurisdiction (R. 2, 72).

These Post Exchanges were organized and operated under Army Regulations 210-65 (issued June 29, 1929), as amended (R. 4, 7-71, 72).

The State of California collected the tax in suit under the California Motor Vehicle Fuel License Tax Act (Appendix A, infra). Appellant paid the tax under protest and brought this suit to recover the tax in the Superior Court, which is the California court of general jurisdiction in first instance.

The complaint alleged (1) that the sales of gasoline to the Army Post Exchanges were exempt under section 10 of the Act, providing that the tax shall not apply,

> "* * * to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, * * *"

and (2) that if the Act is construed and applied to impose a tax upon such sales it is unconstitutional as imposing a burden on instrumentalities or agencies of the United States and subjecting them to regulation beyond the power of the State (R. 4-5).

The State filed an answer admitting the facts alleged in the complaint (R. 72). The case was tried upon the pleadings. The trial court gave judgment for the State, holding that Post Exchanges are not instrumentalities of the United States and therefore not within the exemption of section 10 of the Act. The court also necessarily held that the Act, so construed and applied, was not in violation of the Constitution of the United States (R. 73, 74).

Upon appeal the Supreme Court of California affirmed the judgment of the Superior Court, basing its decision, as did the trial court, upon the ruling that Post Exchanges are not instrumentalities of the Federal Government.

SPECIFICATION OF ERRORS.

The Supreme Court of California erred:

1. In upholding the validity of the Motor Vehicle Fuel License Tax Act (Appendix A, infra) when applied to sales of gasoline made to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and

to the United States Army Post Exchange, Seeley, California;

2. In holding that sales of gasoline to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, to the Eleventh Cavalry Post Exchange, Campo, California, and to the United States Army Post Exchange, Seeley, California, are subject to excise taxes imposed by the California Motor Vehicle Fuel License Tax Act;

3. In holding that the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, the Eleventh Cavalry Post Exchange, Campo, California, and the United States Army Post Exchange, Seeley, California, are not instrumentalities of the Federal Government but are voluntary, unincorporated, cooperative associations of Army organizations largely engaged in business of a private nature;

4. In holding that sales of gasoline to the 250 Coast Artillery Post Exchange, Camp McQuaide, Watsonville, California, the Eleventh Cavalry Post Exchange, Campo, California, and the United States Army Post Exchange, Seeley, California, are not sales to the Government of the United States or a department thereof for the official use of the Government;

5. In affirming the judgment of the Superior Court of the State of California in and for the County of Sacramento in favor of appellee.

SUMMARY OF ARGUMENT.

(1) This Court has power to review the decision that Army Post Exchanges are not instrumentalities of the United States. If the Court in this case and the companion case of *Query v. United States*, No. 619, October Term, 1941, should hold that Army Post Exchanges are federal instrumentalities, its appropriate action would be to vacate the judgment and remand the case for further proceedings by the state court without passing upon the validity of the state statute.

(2) Army Post Exchanges are instrumentalities of the United States Government.

(3) The California Motor Vehicle Fuel License Tax Act, if construed to impose a tax on sales to Army Post Exchanges, is unconstitutional.

ARGUMENT.

I.

THIS COURT HAS POWER TO REVIEW THE RULING OF THE COURT BELOW THAT ARMY POST EXCHANGES ARE NOT FEDERAL INSTRUMENTALITIES. IF IT SHOULD HOLD THAT POST EXCHANGES ARE FEDERAL INSTRUMENTALITIES THE JUDGMENT OF THE COURT BELOW SHOULD BE VACATED AND THE CASE REMANDED FOR FURTHER PROCEEDINGS WITHOUT A DETERMINATION OF THE VALIDITY OF THE STATE STATUTE.

The case presents initial questions with respect to the scope of review and the action appropriately to be taken by this Court. The court below considered two questions (R. 77):

> "Has the State of California the right and power to impose such tax on gasoline sold to United States

> Army Post Exchanges; and if the state has the right to impose such a tax, have sales to army post exchanges been exempted from the payment thereof by section 10 of the Motor Vehicle Fuel License Tax Act?"

The court answered both questions by holding that Army Post Exchanges are not instrumentalities of the United States. In so doing, it decided a federal question subject to review here on either of two grounds:

(1) In the court below appellant contended, first, that Army Post Exchanges are federal instrumentalities and that sales to the Exchanges, therefore, are exempted from the tax by section 10 of the Act (supra, pp. 5-6). Whether the state statute should be construed to exempt these sales is, in the ultimate, a question of state law. However, in deciding this question, the California Supreme Court based its ruling as to the application of the state statute entirely upon its decision of the related but separate federal question whether Post Exchanges are government instrumentalities. In so far as its decision involved the construction of the state statute, the court held that section 10 exempts sales to "instrumentalities of the United States"; then, having so construed the statute, it affirmed the judgment upon the ground that Post Exchanges are not federal instrumentalities under federal law. Among other things, the court said (R. 81-82, 82-83):

> "We do not find that the Supreme Court of the United States has ever directly passed upon the legal status of military post exchanges, yet the question has been before it on three different occasions:
> * * *

> It seems to us after a study of the authorities upon the question before us, that the great weight of authority is in favor of the ruling of the trial court, holding that an army post exchange is not an instrumentality or department of the federal government, but, on the other hand, 'is an organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located.'"

The decision of the state court, therefore, does not rest "upon an independent determination of the state law" (*State Tax Comm'n v. Van Cott*, 306 U.S. 511, 514). It held the exemption provided in section 10 to be inapplicable only by applying "federal law * * * to a solution of a state's problems" (*Breisch v. Central R.R. of N. J.*, 312 U.S. 484, 491). Its decision rests entirely on a determination of federal law and on a complete misconception of federal law (id., p. 491). Under such circumstances, this Court has power to determine the federal question upon which the state court based its decision, and thereafter to remand the case to the state court for further proceedings.

State Tax Comm'n v. Van Cott, 306 U.S. 511;
Breisch v. Central R. R. of N. J., 312 U.S. 484, 491;
Minnesota v. National Tea Co., 309 U.S. 551;
Tipton v. Atchison Ry. Co., 298 U.S. 141, 151-155;
Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120.

(2) Appellant's second contention below was that Army Post Exchanges are federal instrumentalities and that if the state statute were construed to impose a tax in respect of sales to Post Exchanges, it would be invalid under

the federal constitution. On this phase of the case, determination of whether Army Post Exchanges are federal instrumentalities is purely a federal question.

On either of the foregoing grounds, this Court has power to determine whether Army Post Exchanges are federal instrumentalities. In view of the decision below, however, we submit that if this Court should determine that they are federal instrumentalities, it should not exercise its power to hold the California statute unconstitutional, but would more appropriately vacate the judgment and remand the case to the Supreme Court of California for further proceedings. It is a settled rule of this Court not to pass unnecessarily on the constitutionality of a statute. See the authorities reviewed in the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 346, et seq.) Upon remand the court below will have an opportunity, in the light of the ruling of this Court that Post Exchanges are federal instrumentalities, to determine whether the state statute nevertheless imposes the tax. If in these circumstances it holds that the statute does not impose the tax, all necessity for determining the validity of the statute will be eliminated.

A further fact makes it particularly appropriate that this Court, after deciding the Post Exchange question, should remand the case for further proceedings. On April 14 this Court issued a writ of certiorari to the Fourth Circuit in *Query v. United States*, No. 619, October Term, 1941. That case also involves the question whether Post Exchanges are federal instrumentalities, and it is set for argument immediately preceding the argument in the case at bar. If this Court should decide in the

Query case that Post Exchanges are federal instrumentalities, it should not deny the Supreme Court of California an opportunity to reexamine its decision "in the light of the situation which has now developed" (*Patterson v. Alabama*, 294 U.S. 600, 607). Instead, it should exercise its "power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require the Court is bound to consider a change, either in fact or in law, which has supervened since the judgment was entered."

Patterson v. Alabama, 294 U.S. 600, 607;
State Tax Comm'n v. Van Cott, 306 U.S. 511, 515, 516.

II.

UNITED STATES ARMY POST EXCHANGES ARE INSTRUMENTALITIES OF THE FEDERAL GOVERNMENT.

United States Army Post Exchanges are organized, owned and operated in accordance with Army Regulations issued by the Secretary of War with the sanction of the President of the United States as Commander in Chief (R. 4, 72, 7[illegible]71).[4] These regulations are promulgated pur-

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[4] "The secretary of war is the regular constitutional organ of the president, for the administration of the military establishment of the nation; and rules and orders publicly promulgated through him must be received as the acts of the executive, and as such, be binding upon all within the sphere of his legal and constitutional authority. (*United States v. Eliason*, 16 Pet. 291, 302).

See, also, the Act of August 7, 1789, establishing the Department of War, c. 7, 1 Stat. 49.

suant to statutory authority.[5] They have the force of law.[6]

A brief history of the Post Exchange and predecessor institutions appears in a recent opinion of the Judge Advocate General, holding that Post Exchanges are federal instrumentalities and not subject to personal property taxes and registration fees of the District of Columbia (JAG 012.312, War Department, J.A.G.O.,—Feb. 17, 1937). The Judge Advocate General said:

> "The post exchange institution, then sometimes called 'canteen', existence of which was recognized by Congress as early as June 16, 1890 (26 Stat. 154), supplanted the 'post trader' institution, which had been authorized by the act of July 24, 1876 (19 Stat. 100) as a substitute for the institution of 'Army

[5] Act of July 15, 1870, c. 294, sec. 20, 16 Stat. 319:

"That the Secretary of War shall prepare a system of general regulations for the administration of the affairs of the army, which, when approved by Congress, shall be in force and obeyed until altered or revoked by the same authority; and said regulations shall be reported to Congress at its next session: *Provided*, That said regulations shall not be inconsistent with the laws of the United States."

Act of March 1, 1875, c. 115, 18 Stat. 337:

"That so much of section twenty of the act approved July fifteenth, eighteen hundred and seventy, entitled 'An act making appropriations for the support of the Army for the year ending June thirtieth, eighteen hundred and seventy-one, and for other purposes,' as requires the system of general regulations for the Army therein authorized to be reported to Congress at its next session, and approved by that body, be, and the same is hereby, repealed; and the President is hereby authorized, under said section, to make and publish regulations for the government of the Army in accordance with existing laws."

[6] See: *United States v. Query*, 37 F. Supp. 972, 975 (aff'd 121 F. (2d) 631; cert. den. 62 Sup. Ct. 295); *Henry Woog, Administrator, v. The United States*, 48 Ct. Cl. 80, 88, 89; *Thomas B. Dugan v. The United States*, 34 Ct. Cl. 458; *United States v. Morehead*, 243 U. S. 607; *Smith v. Whitney*, 116 U. S. 167, 181; *Kurtz v. Moffitt*, 115 U. S. 487, 503; *Gratiot v. United States*, 4 How. 80, 117, 118; *United States v. Eliason*, 16 Pet. 291, 302; *F. T. Dooley Lumber Co. v. United States*, 63 F. (2d) 384; cert. den. 290 U. S. 640.

sutler', abolished and its functions transferred to the Subsistence Department of the Army by section 25 of the act approved July 28, 1866 (14 Stat. 332, 336). The ancient institution of 'sutler' was inherited from the Continental Army, 'to the articles, rules and regulations' of which it was made amenable by act of June 30, 1775 (2nd Continental Congress, Journal of Congress, vol. 1, pp. 90, 93). And by act of September 20, 1776, the Continental Congress prescribed regulations for sutlers and that supervision of 'suttling' was a military duty of station commanders (Journal of Congress, vol. 1, pp. 482, 485). (16 Op. Atty. Gen. 658; Kenny v. U.S., 62 Ct. Cl. 328, 335).

Said statutory authorization for appointment of 'post traders' was terminated by the act approved January 28, 1893 (27 Stat. 426), prior to which the post exchange institution had been established in the Army—and authorized by Congress to use public buildings and public transportation when available, by the act of July 16, 1892 (27 Stat. 178).

* * * * * * *

Thus, it is apparent, that the Congress terminated the institution of 'post trader' which it had inaugurated to meet certain needs of the Army, in the light of the knowledge that the institution of the Army post exchange had been established upon the executive authority of the President as constitutional Commander-in-Chief of the Army and was meeting those needs in a better manner, and to the greater good of the Army, and with more advantage to the Federal Government than had been done under the post trader institution, which it accordingly abolished, and in lieu of which reliance has thenceforward been had upon the post exchange."

Post Exchanges are intended to aid the comfort and morale of enlisted men. Specifically, the Army Regulations provide that their primary purposes are (R. 9):

"(1) To supply troops, at the lowest possible prices, with articles of ordinary use, wear, and consumption not supplied by the Government.

(2) To afford to troops means of rational recreation and amusement.

(3) Through exchange profits to provide, when necessary, the means for improving the company messes."

The regulations prescribe in every detail for the formation, ownership and operation of Post Exchanges (R. 7-71).

Sales by Post Exchanges may be made only to

"(1) Such personnel and organizations as are now or may be hereafter authorized by law and regulation to purchase subsistence stores or other quartermaster supplies * * *.

(2) Civilians employed or serving at military posts" (R. 63).

Post Exchanges are conducted by officers regularly assigned to such duty by Army orders (R. 14-20, 57-58, 63, 68); they are supervised by Post Exchange Councils, likewise composed of Army officers assigned to such duty (R. 15-17); they are under the control of the post commanders (R. 8, 14). No officer can share in or benefit from Post Exchange profits, or receive any bounty or gratuity at its expense (R. 11-12, 54-55, 67-68). Officers conducting Post Exchanges are rendering regular military service. They receive their army pay and no additional compensation (R. 17).

None of the capital of the Post Exchange is individually owned, none of its profits go to any individual for personal use. The members of the Exchange are "com-

panies, troops, batteries, aero squadrons, or other similarly organized units and detachments'' of the Army (R. 10). Profits go to post recreation funds, libraries, Chaplain's fund, band funds, and other detachment funds—the expenditures being prescribed by the Army Regulations (R. 11-12, 54-55, 67-68). Each of these funds in turn serves a governmental purpose, including the improvement of messes, the benefit of the sick in the hospital, and in general, the moral, mental and physical improvement of the troops (R. 11-12).[7]

Post Exchanges are authorized to use Government supplies (R. 42) and to occupy Government buildings (R. 37-38);[8] their business messages are transmitted free of charge over War Department telegraphs, cables and radios (R. 41);[9] they are entitled to the legal services of the United States Attorney to protect their rights and interests (R. 50); their mail is carried free of postage (R. 46) under the federal statute providing that

> "It shall be lawful to transmit through the mail, free of postage, any letters, packages, or other matters relating exclusively to the business of the Government of the United States; official mail matter of all officers of the United States Government, * * *" (39 U.S.C. 321).

Congress has periodically appropriated funds for the construction, equipment and maintenance of Post Exchange buildings.[10]

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[7] *United States v. Query*, 37 F. Supp. 972, 974.
[8] See *Falls City Brewing Co. v. Reeves*, 40 F. Supp. 35, 39.
[9] *United States v. Query*, 37 F. Supp. 972, 974.
[10] See, 32 Stat. 937, 938; 33 Stat. 270; 33 Stat. 836; 34 Stat. 253, 1169; 35 Stat. 119, 516, 744; 36 Stat. 255, 1050; 37 Stat.

In 1933, Congress provided that the unobligated balances of Post Exchange funds be paid into the Federal Treasury.[11] Later part of these funds were made available to the Veterans Administration for payment of expenses of indigent World War veterans,[12] and still later the balance was put in the surplus fund of the Treasury.[13]

582, 619, 715; 38 Stat. 364, 1076; 39 Stat. 636; 40 Stat. 56, 195, 363, 479, 830, 862, 1029; 41 Stat. 118, 963, 1184; 42 Stat. 83, 719, 1056, 1167, 1380; 43 Stat. 480, 711, 895; 44 Stat. 190, 256, 1108; 45 Stat. 49, 329, 1352; 46 Stat. 435, 1280; 47 Stat. 667, 696, 1573, 1601; 48 Stat. 617, 642; 49 Stat. 124, 148, 1281, 1309; 50 Stat. 445, 468; 52 Stat. 645, 667; 53 Stat. 596, 618; 54 Stat. 354, 378, 966. The statutes making these appropriations are commented upon by the Judge Advocate General in his opinion of February 17, 1937, supra, p. 13:

> "In addition to the specific instances of congressional recognition of the Army post exchange as an agency and instrumentality of the Federal Government heretofore pointed out, attention is invited to the many instances of congressional recognition of the post exchange as entitled to receive support from public funds appropriated from the Federal Treasury. Since 1892 Congress has appropriated some eleven million dollars to the support and maintenance of the post exchange, by some forty odd acts. Indeed, almost annually, for more than thirty years Congress has had recourse to and reliance upon the Army post exchange institution for the accomplishment of certain functions or activities supported by the Congress from the public revenues, under its constitutional power 'To raise and support Armies * * *' (art. I, sec. 8, cl. 12, Const.)."

[11] Act of March 4, 1933, c. 281, 47 Stat. 1571, 1573; *United States v. Query*, 37 F. Supp. 972, 976; Opinion of the Judge Advocate General, February 17, 1937, supra p. 13.

[12] Act of June 16, 1933, c. 101, 48 Stat. 283, 303.

[13] Act of June 26, 1934, c. 756, sec. 8, 48 Stat. 1224, 1229.

Under a 1919 War Department Directive (1919, War Department Circular 129), funds of demobilized organizations were ordered turned in to the War Department. Post Exchange funds of disbanded organizations fell within the provisions of this directive (Opinion of the Judge Advocate General 153, November 6, 1919).

Executive and administrative rulings for more than half a century have held that Post Exchanges are federal instrumentalities. As was said in *United States v. Query*, 37 F. Supp. 972, 976:[14]

> "The President of the United States, the heads of the various departments of the United States, to whose opinions the courts always give great weight, New York ex rel. Rogers v. Graves, 299 U.S. 401, 406, 407, 57 S. Ct. 269, 81 L.Ed. 306, including the Attorney General, the Comptroller of the Treasury, the Comptroller General, the Postmaster General, the Secretary of War, the Secretary of the Navy, and the Commissioner of Internal Revenue, have in many instances held that Post Exchanges and their predecessors were federal instrumentalities."

We have referred to one of the many rulings of the Judge Advocate General (supra, pp. 13-14), and shall cite only a few additional illustrative rulings by the Departments of the Government.

By Executive Order dated February 6, 1934, No. 6589, the President of the United States declared that:

> "* * * this order shall apply to and include all vehicles owned and operated by the United States Government and by legally authorized instrumentalities thereof, such as post exchanges, * * *."

This Executive Order was submitted to, and had the approval as to form and legality by, the Attorney General.[15]

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[14]The decision of the Circuit Court of Appeals in this case is pending before this Court on writ of certiorari, No. 619, October Term, 1941.

[15]37 Op. Att. Gen. 435, 437.

On August 5, 1939, Acting Attorney General Robert H. Jackson rendered an opinion that Army Post Exchanges are federal instrumentalities and, as such, not subject to the Hawaii Tobacco Tax Act. The opinion reviews the authorities relating to the question and concludes:

> "From the above authorities it seems well settled that Army post exchanges are instrumentalities of the Federal Government, * * *" (39 Op. Att. Gen. 316, 319).

Consistent with many other rulings of the Treasury Department and of the Comptroller General,[16] the Treasury Department recently held[17] that Army Post Exchanges are instrumentalities of the United States within the meaning of section 811 (b) 6, Title VIII, and section 907 (c) 5, Title IX, of the Social Security Act. These subsections except from the term "employment" "service performed in the employ of the United States Government, or of an instrumentality of the United States." The ruling states (p. 442):

> "Under the facts stated, it appears that Army post exchanges are engaged in carrying out functions of

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[16]For example:

The Comptroller General on February 8, 1913, in a decision holding that stoppage against the pay of enlisted men of the Army may be made to reimburse the Post Exchange Fund, said (19 Comp. Dec. 515, 517):

> "Now, the funds of the post exchange are moneys used in carrying on this public agency; and the Government has a right to protect its instrumentalities * * *."

The Treasury Department, in S.T. 620, Cumulative Bulletin XII-1, 419, 420, held:

> "The Department consistently held that post exchanges, being governmental agencies, were exempt from the taxes imposed by various Revenue Acts in the past where such taxes would have been imposed directly upon the post exchange as the taxpayer, on the ground that it is not the policy of the Government to tax its own enterprises."

[17]S. S. T. 269, C. B. 1938-1, 441.

> the United States Government. It is accordingly held that such exchanges are instrumentalities of the United States and that neither such exchanges nor their employees are subject to the taxes imposed by Titles VIII and IX of the Social Security Act."

In a later and related decision, the Treasury Department held[18] that Army Post Exchanges are "wholly-owned" instrumentalities of the United States within sections 1426(b) 6 and 1607 (c) 6 of the Internal Revenue Code. These two subsections were incorporated into the Internal Revenue Code from the Social Security Act. Amendments of 1939 to that Act relative to the term "employment" except therefrom, "Service performed in the employ of the United States Government, or of an instrumentality of the United States which is (A) wholly owned by the United States, or (B) exempt from the taxes imposed by section 1410 by virtue of any other provision of law; * * *." The ruling states (p. 202):

> "A partial description of the organization and activities of Army post exchanges is contained in S. S. T. 269, supra. Additional facts now submitted relative to the organization, ownership, and operation of such post exchanges show that they are wholly owned by the United States within the meaning of sections 1426(b) 6 and 1607 (c) 6 of the Internal Revenue Code, as amended."[19]

The court decisions are to the same effect. In *Falls City Brewing Co. v. Reeves*, 40 F. Supp. 35, the court said (pp. 39-40):

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[18] S. S. T. 385, C. B. 1940-1, 202.

[19] The decision to the contrary quoted in the opinion of the court below (R. 82) is by the Board of Tax Appeals for the District of Columbia, *not* the United States Board of Tax Appeals.

"There can be no real doubt but that the Post Exchange as it is presently operated under army regulations, promotes in a large measure the welfare of the military personnel and that except for such operations the Government would itself be called upon to supply such facilities. Considered in this light it is certainly a subordinate or auxiliary agency and falls easily within the accepted definition of an instrumentality of the United States."

In accord are:

United States v. Query, 37 F. Supp. 972; affirmed 121 F. (2d) 631;[20]

Henry Woog, Administrator v. The United States, 48 Ct. Cl. 80, 88-89;

Thomas B. Dugan v. The United States, 34 Ct. Cl. 458;

Post Exchange, 31st Infantry v. Grover C. Keeney (Reg. No. 30920, Aug. 20, 1929, Supreme Court of the Philippine Islands).

In the light of all the foregoing—cases, statutes, administrative rulings, custom, history, purpose, and actual manner of operation—we submit that there is no warrant whatever for the ruling below that the post exchange "is not an instrumentality or department of the federal government, but, on the other hand, 'is an organization largely engaged in business of a private nature * * *' " (R. 82-83). A brief reference will, nevertheless, be made to the authorities cited in the opinion below.

The court below cited,

People v. Standard Oil Co., 218 Cal. 123;

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[20] This case is now before this Court on writ of certiorari granted April 14, 1942, No. 619, October Term, 1941.

Thirty-First Infantry Post Exchange v. Posadas, 54 Phil. 866;

Keane v. United States, 272 Fed. 577;

Pan American Petroleum Corporation v. State of Alabama, 67 F. (2d) 590.

People v. Standard Oil Co., a prior decision of the court below, was reversed by this Court on other grounds (291 U. S. 242; see p. 28, infra).

The *Posadas* case did not hold that Post Exchanges are not federal instrumentalities (54 Phil., 877):

> "We rule that an Army Post Exchange, although an agency within the United States Army, cannot secure exemption from taxation * * *."

This ruling was put upon the grounds (1) that the Philippine tax act in question had been ratified by Congress and that Congress thereby had consented to the imposition of the tax, and (2) that regardless of this ratification, and regardless of the fact that Army Post Exchanges might be federal instrumentalities, the tax in question was valid.

Keane v. United States, supra, involved the question whether an Army Post Exchange "is such a lawful department of the government as to bring it within the protection of section 37 of the Criminal Code." That section makes it a criminal offense to "conspire either to commit any offense against the United States, or to defraud the United States." The court's decision was based upon a strict construction of this penal statute. In so far as the court dealt with the question here involved its opinion was based, at least in part, upon an erroneous premise. It said (p. 587):

"We think that this highly penal statute cannot apply to any lawful department, so as that a fraud upon the United States can arise from or be involved in any transaction concerning it, unless such lawful department is created by Congress or directly authorized by it, and in addition thereto it must be 'such a lawful department' as that Congress appropriates the public moneys to maintain and operate."

The opinion then cites the Act of July 16, 1892 (27 Stat. 178),

"* * * hereafter, no money appropriated for the support of the Army shall be expended for post gardens * * * or exchanges"

and adds (p. 583):

"And in passing we might say that this is the only reference to a post exchange that we have been able to find in the mass of statutes passed by Congress from its first session down to the present. Congress has recognized the importance of, and necessity for, post schools and post bakeries, and expressly provides for them."

The fact is that Congress on numerous occasions has appropriated money for Post Exchanges (supra, pp. 16-17).

Elsewhere in its opinion the court said (272 Fed. p. 581):

"Nowhere in these regulations do we find a rule or even a suggestion that under any possible contingency does or would the government ever receive or come into possession of any of the funds or assets of the exchange."

As pointed out above, Congress has provided that unobligated balances of Post Exchange funds be paid into the Federal Treasury (supra, p. 17).

Beyond this, the same court that decided the *Keane* case recently held that Post Exchanges are instrumentalities of the Federal Government (*Query v. United States*, 121 F.(2d) 631).

In *Pan American Petroleum Corp. v. Alabama*, supra, the court gave little consideration to the question whether Army Post Exchanges are instrumentalities of the Federal Government. The statement in the opinion on this point is a dictum; the only authority cited was the decision of the Supreme Court of California in *People v. Standard Oil Co.*, discussed at p. 22, supra.

III.

THE CALIFORNIA MOTOR VEHICLE FUEL LICENSE TAX ACT, IF CONSTRUED TO IMPOSE A TAX ON SALES TO ARMY POST EXCHANGES, IS UNCONSTITUTIONAL.

Although the recent decisions of this Court have changed in many respects the law relating to reciprocal exemptions from taxation of the State and Federal Governments, it is the law today, as it has been since the decision of this Court in *McCulloch v. Maryland*, 4 Wheat. 316, that the states may not impose taxes upon the Federal Government and its instrumentalities, or upon the transactions of either.

Osborn v. United States Bank, 9 Wheat. 738, 865, 867;

Weston v. City Council of Charleston, 2 Pet. 449, 463, 465-466;

Dobbins v. Erie County, 16 Pet. 435, 443, 447;

Farmers Bank v. Minnesota, 232 U.S. 516, 526;

Choctaw & Gulf R. R. v. Harrison, 235 U.S. 292;

Johnson v. Maryland, 254 U.S. 51.
Indian Motorcycle Co. v. U. S., 283 U.S. 570;
Alabama v. King & Boozer, 314 U.S. 1.

"With regard to taxation, no matter how reasonable, or how universal and undiscriminating, the State's inability to interfere has been regarded as established since *McCulloch v. Maryland*, 4 Wheat. 316. The decision in that case was not put upon any consideration of degree but upon the entire absence of power on the part of the States to touch, in that way at least, the instrumentalities of the United States; 4 Wheat. 429, 430; and that is the law today" (Holmes, J., *Johnson v. Maryland*, 254 U.S. 51, 55).

The reasoning of certain decisions—that a tax upon individuals is invalid if the economic burden of the tax is passed on to the Government—has been rejected.

"The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Knox, supra; Graves v. Texas Co., supra*, we think it no longer tenable" (*Alabama v. King & Boozer*, 314 U.S. 1, 9).

But no case upholds a tax laid directly upon the Government or directly upon a transaction of the Government. The tax sustained in *Alabama v. King & Boozer* was upon a transaction between two individuals which *preceded* the transaction with the Government. Upon this ground the tax was upheld (314 U.S., 9, 12):

"The contention of the Government is that the tax is invalid because it is laid in such manner that, in

> the circumstances of this case, its legal incidence is on the Government rather than on the contractors, who ordered the lumber and paid for it but who, as the Government insists, have so acted for the Government as to place it in the role of a purchaser of the lumber. • • •
>
> The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it. • • •
>
> • • • • • • • •
>
> We think, as the Supreme Court of Alabama held, that the legal effect of the transaction which we have detailed was to obligate the contractors to pay for the lumber. The lumber was sold and delivered on the order of the contractors, which stipulated that the Government should not be bound to pay for it. It was in fact paid for by the contractors, who were reimbursed by the Government pursuant to their contract with it. The contractors were thus purchasers of the lumber, within the meaning of the taxing statute, and as such were subject to the tax."

In contrast, the "legal incidence" of the tax here in question was upon the Government. It is true that the California statute nominally imposes the tax upon the distributor:

> "A license tax is hereby imposed for the privilege of distributing • • • any motor vehicle fuel" (sec. 3, Appendix, p. i, infra).

And the California Supreme Court in several cases has characterized the tax as one upon distributors.[21] But in

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[21] *Rio Grande Oil Co. v. Los Angeles*, 6 Cal. App. (2d) 200, 201; *People v. Ventura Refining Co.*, 204 Cal. 286, 294; *Western L. Co. v. State Bd. of Equalization*, 11 Cal. (2d) 156, 162; *Standard Oil Co. v. Johnson*, 10 Cal. (2d) 758; 767-768.

operation and effect the tax is one upon the purchaser, and the California decisions have so held:

> "The clear intent of the law was to levy an excise or occupation tax upon distributors of motor vehicle fuel, giving such distributors, however, ample opportunity to fully indemnify themselves by adding the amount of the tax to the selling price of the fuel *and thus in effect collect the tax from the consumer*" (*People v. Ventura Refining Co.*, 204 Cal. 286, 294; *Rio Grande Oil Co. v. Los Angeles*, 6 Cal. App. (2d) 200, 201).

> "It is perfectly clear, as has been before stated, that the provisions themselves of the act of 1923 imposing a tax of two cents on every gallon of fuel gas, to be used in gas-propelled motor vehicles, show that the legislature, *ex industria*, intended that that plan *of imposing a privilege tax on those operating or causing to be operated such motor vehicles upon the highways* of the state should be in lieu of the registration fee such persons were theretofore required to pay. We, therefore, hold that the two acts of 1923 under consideration, in so far as they provide, respectively, for a registration fee for electric motor vehicles and the excise or privilege tax on gas for gas-propelled motor vehicles were intended to constitute a single plan or scheme *for compelling persons operating or causing to be operated motor vehicles upon the public highways of the state to pay a fee or a tax,* * * *" (*Old Homestead Bakery, Inc. v. Marsh*, 75 Cal. App. 247, 260-261).

That the tax in operation and in effect is one upon the purchasers follows from the statute itself. Section 11 provides (Appendix, pp. iv-v):

> "Any person * * * who shall buy and use any motor vehicle fuel for purposes other than in motor

vehicles operated upon the public highways * * *, or who shall export the same * * *, or any employee of the United States Government, who shall buy any motor vehicle fuel and use the same exclusively in the transportation of * * * mail * * * or the government of the United States * * * *who shall have paid any license tax for such motor vehicle fuel hereby required to be paid,* * * shall be reimbursed and repaid the amount of such license tax *paid by him or it* upon presenting to the State Controller an affidavit * * *."

In *Oswald v. Johnson*, 210 Cal. 321, and *Guardia v. Johnson*, 134 Cal. App. 574, the California courts directed refunds to be made, pursuant to this section, to persons who were not distributors but who had paid the tax on gasoline bought and used for purposes other than in motor vehicles operated upon the highways.

These authorities establish, as the Solicitor General of the United States heretofore has advised this Court,[22] that the challenged tax, in operation and effect, is one upon the purchaser. It follows that the statute, construed to impose the tax upon a federal instrumentality, is invalid. (See authorities cited, supra, pp. 24-25).

We should point out that in *Standard Oil Co. v. California*, 291 U.S. 242, this Court dealt with the same taxing act, and held that it imposes "taxes in respect of sales and deliveries"; that in operation the tax is a "tax upon transactions" (291 U.S., 244). If this view be adopted—

[22] In the "Tabular Annex" of "State Taxing Statutes classified as to incidence of the tax," appearing on page 29 of Appendix B to the brief for the United States in *Alabama v. King & Boozer*, supra (No. 602, October Term, 1941), the Motor Vehicle Fuel License Tax Act of California is classified as one imposing "Taxes on Vendee."

and where federal rights are asserted the decision of this Court as to the operation and effect of the statute is controlling[23]—the tax is one directly upon a transaction of the United States and for that reason also is invalid. (See authorities cited at pp. 24-25, supra.)

CONCLUSION.

We respectfully submit that the judgment of the court below should be vacated and the cause remanded for further proceedings.

Dated, San Francisco, California,
April 27, 1942.

Respectfully submitted,

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(Appendix Follows.)

[23] *Educational Films Corp. v. Ward*, 282 U.S. 379, 387; *Lawrence v. State Tax Comm.*, 286 U.S. 276, 280; *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 443-444.

Appendix.

Appendix A

CALIFORNIA MOTOR VEHICLE FUEL LICENSE TAX ACT.

"Sec. 3. A license tax is hereby imposed for the privilege of distributing, within the meaning of section 7 of this act, any motor vehicle fuel. Said license tax shall be according to or measured by the gallonage of motor vehicle fuel so distributed in this State and shall be at the rate of three cents for each gallon of such fuel refined, manufactured, produced, blended or compounded by such distributor in this State and so distributed by him in this State, or imported by such distributor into and so distributed by him in this State otherwise than in the original package or container in which such motor vehicle fuel was imported into this State, and for each gallon of motor vehicle fuel imported into this State and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter so distributed by such distributor otherwise than in the original package or container in which the same was imported into this State."

"Sec. 7. For the purposes of this act all motor vehicle fuel sold, donated, consigned for sale, bartered or used shall be deemed to be distributed, and to insure the proper administration of this act and to prevent evasion of the license tax hereby imposed it shall be presumed that all motor vehicle fuel refined, manufactured, produced, blended or compounded in this State, or imported into this State, and no longer in the possession of the distributor, has been distributed unless the contrary is established; provided, however, that the exchange of motor vehicle

fuel for motor vehicle fuel, gallon for gallon, shall not be considered a taxable distribution; and provided, that in lieu of the collection and refund of the tax on motor vehicle fuel used by a distributor in such a manner as would entitle a purchaser to claim refund under the provisions of section 11 hereof, credit may be given such distributor upon his tax return and assessment; and provided further, that under such regulations as the State Board of Equalization may prescribe, sales and other deliveries of natural gasoline may be made to a duly licensed distributor free of tax.

Nothing in this act shall be construed as requiring the payment of the license tax herein specified upon more than one sale, distribution or transfer of the same motor vehicle fuel."

"~~Sec. 10.~~ The provisions of this act requiring the payment of license taxes shall not be held or construed to apply to motor vehicle fuel imported into this State in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce, nor to any motor vehicle fuel exported from this State by the distributor or delivered by the distributor to any vessel clearing from a port of this State for a port outside of this State and actually exported from this State in such vessel, nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, but every distributor shall be required to report such exports and sales to the State Board of Equalization in such detail as that board may

require, otherwise the exemption herein granted shall be null and void and all such fuel shall be considered distributed in this State subject fully to the provisions of this act.

Export certificates. In support of any exemption from license taxes claimed under this section on account of the exportation of motor vehicle fuel, every distributor must execute an export certificate in such form as shall be prescribed, prepared and furnished by the State Board of Equalization, containing a sworn statement, made by some person having actual knowledge of the fact of such exportation, that the motor vehicle fuel has been exported from the State of California, and giving such details with reference to such shipment as said board may require. All export certificates must be completed and on file in the office of the State Board of Equalization within sixty days after the close of the calendar month in which the shipments to which they relate are made, and no certificate not completed and filed within such period shall be recognized for any purpose by the State of California or any agency thereof. The State Board of Equalization may demand of any distributor such additional data as are deemed necessary by said board in support of any such certificate, and failure to supply such data will constitute a waiver of all right to exemption claimed by virtue of such certificate.

Time for making exemption claim. Any claim for exemption based on a sale to the United States government or any department thereof may be made by the distributor at any time within six months from the date of sale by filing such claim in the office of the State Board

of Equalization, but no claim made after the expiration of said period of six months shall be recognized for any purpose by the State or any agency thereof.

Sec. 11. Any person, firm, association or corporation who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles operated upon the public highways of the State of California, or who shall export the same for use outside of this State, or any employee of the United States Government, who shall buy any motor vehicle fuel and use the same exclusively in the transportation of rural free delivery mail and special delivery mail or the government of the United States or any department thereof which buys motor vehicle fuel for official use of said government or department and on which fuel no claim for exemption from payment of the tax imposed by this statute could be filed in accordance with section 10 of this act and who shall have paid any license tax for such motor vehicle fuel hereby required to be paid, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such license tax to the price of such fuel, shall be reimbursed and repaid the amount of such license tax paid by him or it upon presenting to the State Controller an affidavit supported by the original invoice or invoices showing such purchase, which affidavit shall be verified by the oath of the claimant and shall state the total amount of such fuel so purchased and that the claimant has paid the price thereof and the manner and the equipment in which the claimant has used the same; provided, however, that any motor vehicle fuel carried from this State in the fuel tank of a motor vehicle shall not be considered as exported from this State.

The State Controller, upon the presentation of such an affidavit and such invoice or invoices shall cause to be paid to such claimant, from the license taxes collected in accordance with the provisions of this act, an amount equal to the license taxes collected hereunder on such motor vehicle fuel; provided, however, that the State Controller shall have the right, if he so desires, in order to establish the validity of any claim, to examine the books and records of the claimant for such purpose and the failure upon the part of the claimant to accede to such demand shall constitute a waiver of all right to the refund claimed on the account of the transactions questioned. Such examination may be made either through employees of the office of the State Controller or of the office of the State Board of Equalization.

All such applications for refund based upon exportation of motor vehicle fuel from this State must be filed with the State Controller within ninety days from the date of exportation; all other applications shall be filed within twelve months from the date of the purchase of such motor vehicle fuel. Any application filed after the time herein prescribed shall not be considered for any purpose by the State Controller, the State Treasurer or the State of California."

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 1125

STANDARD OIL COMPANY OF CALIFORNIA,
Appellant,

vs.

CHARLES G. JOHNSON, as Treasurer of the State of California,
Appellee.

Appeal from the Supreme Court of the State of California.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

The opinion of the Supreme Court of the State of California (R. 76) is reported at 19 Advance California Reports 125; 119 Pac. (2d) 329. The trial Court did not render an opinion; its conclusions of law and judgment are at R. 73, 74.

STATEMENT OF THE CASE.

The statement of the case contained in appellant's brief is accurate and appellee accepts it.

SUMMARY OF ARGUMENT.

Appellee in answer to the argument of appellant will show (1) that Army post exchanges are voluntary unincorporated associations of military personnel and are not instrumentalities of the government of the United States; (2) that the California Motor Vehicle Fuel License Tax Act is an excise tax imposed upon distributors of gasoline for the privilege of distributing and does not impose any direct burden upon the post exchanges; and (3) that even though it be held that post exchanges are instrumentalities of the United States Government and that the tax is levied directly upon them it is constitutional.

ARGUMENT.

I. ARMY POST EXCHANGES ARE NOT INSTRUMENTALITIES OF THE UNITED STATES GOVERNMENT.

Appellant has included in its brief a historical sketch of army post exchanges and their predecessors. The conclusion which appellant appears to glean from this discussion is that army post exchanges are authorized by Congress and by reason of this authorization together with that of the President of the United States and the Secretary of War become a part and parcel of the government of the United States and entitled

to all privileges and immunities which may attend such characterization. The difficulty with this conclusion is that the first premise upon which the whole structure depends is, in fact, not present. There is not any direct authorization for the creation of army post exchanges to be found in any Act or declaration of the Congress of the United States. Congress has never in those acts which by implication recognize the fact of existence of army post exchanges indicated any intent or desire that they be considered a "creature of Congress" or that they be considered synonymous with the United States Government or be an instrumentality thereof.[1] The following from the report of committee of the Senate on H. R. 6687 (Calendar No. 1692, Report No. 1625 of Senate, 76th Congress, 3rd Session) is pertinent on this point:

> "For example, tangible personal property purchased from a commissary or ship's store by an army or naval officer or other person so permitted to make purchases from such commissary or ship's store, is exempt from the State sales tax or use tax since the commissary or ship's store is an instrumentality of the United States and the purchaser is an authorized purchaser. *If voluntary unincorporated organizations of Army and Navy personnel such as post exchanges are held by the courts to be such instrumentalities, the same rule will apply to similar purchases from such organizations; but if they are held not to be such instrumentalities, property so pur-*

[1] See *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 at 476, where this Court said "• • • since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, • • •"

*chased from them will be subject to the State sales or use tax in the same manner and to the same extent as if such purchase was made outside a Federal area. * * *"*

This language is certainly not consistent with a conception that army post exchanges were authorized by Congress as a part of the United States Government.

Appellant, however, seeks to repair the absence of this essential premise by the statement that Congress authorized the Secretary of War to promulgate the regulations which created the army post exchanges and implies that by such authorization the post exchanges had the same status as if directly created by Congress. It should be noted that the only authority granted to the Secretary of War was to "prepare a system of general regulations for the administration of the affairs of the army * * *" (Act of July 15, 1870, c. 294, sec. 20, 16 Stat. 319.) This contention of appellant was considered in *Keane v. U. S.*, 272 Fed. 577, 580 (CCA 4), and disapproved in the following language:

> "In this connection, the counsel for the Government, in his brief and argument, insists that post exchanges are governmental institutions, associations, and agencies, and says:
>
> "'It cannot be denied that such agents are established under regulations promulgated and established by the War Department.'
>
> "He refers us to Section 161 of the revised Statutes (Comp. St. Section 235) for the author-

ity of the Secretary of War to make such regulations with reference to these exchanges. The Section reads as follows:

"'The head of each department is authorized to prescribe regulations not inconsistent with law, for the government of his department, the conduct of his officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.'

"This section only gives the heads of departments, including the Secretary of War, power to issue rules and regulations for the administration of their departments. Indeed, the power conferred by this section is administrative only (*U. S. v. George*, 228 U. S. 14, 33 Sup. Ct. 412, 57 L. Ed. 712), which means that the Secretary of War, if he had power to issue the the regulation at all, only had power to compel or permit the soldiers to establish these post exchanges in question, but could not, in the absence of the express authority of Congress, make persons not connected with his department bound by such regulations, or subject to the pains and penalties of criminal law. If a head of a department has the power to make rules which subject classes of property to forfeiture and classes of persons to penalties, that power must be expressly given him by Congress, and well defined, so as to make his rule or regulation an act of the supreme law-making body. He will get no such power from Section 161 of the Revised Statutes. *U. S. v. 11,150 pounds of Butter*, 195 Fed. 657, 115 C.C.A., 463.".

Appellee believes that the decision of the Supreme Court of California in the case at bar is amply supported by the facts and the army post exchanges are voluntary unincorporated associations of army organizations over which the War Department exercises purely a paternal influence. They are not unlike the employee organizations which are common in many of our large industrial units. These units furnish food at minimum prices, sell certain articles such as cigarettes and candy, and the funds gained from such activity are used to finance social affairs and afford recreational facilities for the employees. They are encouraged by employers as obviously such activity tends to build morale and decrease labor turn-over. Often the employer will furnish quarters for the organization. The employer, although it has some control over the organization because of its position, assumes no obligation financial or otherwise in connection with its activities. In Life Magazine, issue of April 24, 1942, some activities of an organization formed by employees of the Treasury Department of the United States are depicted. Appellant does not believe that any Court would consider this latter organization an instrumentality of the United States, nor hold an employee organization, as hereinabove described, to be an integral part of the employer organizations. In the event that the United States Government took over the industrial plant and the War Production Board specifically authorized the continuance of the employee organization and promulgated regulations regarding its operation it is inconceivable to appellee that such employee organization would be held to assume the status of an instrumentality of the United States and

all of its actions thereafter be considered governmental in character.

Yet the contention made by appellant narrows itself down to a request that this Court hold that such an organization is a part and parcel of the United States and all its acts therefore governmental in character.

Federal Land Bank v. Bismarck Lumber Co., 314 U. S. 95.

Appellee submits that army post exchanges are purely employee organizations formed under the active encouragement and assistance of the United States Army but in no respect partaking of the governmental character of the Army itself. A survey of the regulations which allow for their operation clearly sustains the accuracy of this latter statement.

Sec. 1 of A.R. 210-65 (R. 7) provides:

> "At each post, camp or station, the commanding officer will establish and maintain a post exchange whenever:
>
> "(1) There is a need for it.
>
> "(2) There are organizations present that desire to participate therein.
>
> "(3) The personnel is sufficient to profitably maintain and support such an exchange."

It should be noted that all three factors set forth above must be present to warrant the creation of a post exchange. This is necessarily the proper interpretation of the regulation for the reason that membership is not obligatory (R. 8) and the post exchange funds are obtained from the participating organizations. (R. 38.) Thus the element of profit is also an essential basis for the establishment of a post ex-

change. This requirement completely dissipates the theory of appellant that the operation of the post exchange is a required and essential part of the operation of the United States Army.

A second item of importance in this regard is the fact that the post exchange sells to all personnel and organizations authorized to purchase subsistence stores or other quartermaster supplies and to *Civilians employed or serving on military posts.* Further the purchases are not limited to articles for their own use but include anything for the use of the dependent members of the purchaser's family. (R. 63.)

The resemblance between an army post exchange and a large cooperative commercial enterprise is shown by the list of approved activities (R. 9):

> "An exchange may include when desirable, the following activities:
>
> "(1) A well stocked general store, including when deemed desirable by the council and approved by the commanding officer, a meat market, a vegetable market, and a gasoline filling station. Sales to civilians at a filling station will be limited to civilian employees of the post, camp, or station.
>
> "(2) A well-kept restaurant * * *
>
> "(3) A barber shop, laundry, tailor shop, and shoe-repair shop.
>
> "(4) * * *"

Thus a civilian who is working at the exchange as a clerk, cook or barber or at the post as a carpenter or in any other capacity, has the right to purchase gasoline for use on the highways of this state, and under appellant's theory, at a cost which would not

include the distributor's tax levied under the Motor Vehicle Fuel License Tax Act for the purpose of meeting the expense of maintaining and improving those highways.

The following excerpt from Collier's Magazine for June 27, 1941, at page 23, emphasizes the nature of the post exchange as a commercial organization:

> "Post Exchange Officer Maj. H. E. McGaffey called from retirement after twenty-four years in the Army and ordered to set up Blanding's canteens, launched the business last November 9th in a one-room building with an operating force consisting of himself, four non-coms, one private, one light truck, and of capital not a red cent except $60 of his own which he converted into change. Today the P-X employs *440 civilians* and 198 soldiers, has an $18,500 pay roll every fifteen days, sells around $350,000 worth of merchandise every month and turns over its entire stock every twenty days. It's an enterprise for which almost any businessman would sell his soul. The P-X operates the Central Exchange, which serves as headquarters; thirty-five canteens (one for each regiment), three warehouses, light trucks, three bus terminals, seven taxis, eight public filling stations, a garage, a restaurant, four cafeterias and a privately operated shoe repair shop." (Emphasis ours.)

In view of the potential size of the operations of post exchanges as illustrated in the above quotation, the provisions of Sec. 48 A. R. 210-65 (R. 38) are especially significant:

> "(a) The expense of fitting up the quarters of an exchange and procuring the necessary articles for the first stock and fixtures will be met

by assessment from the funds of the several organizations which make up the membership of the exchange, or these will be contracted for, or procured on credit. When procured on credit, the bills will be paid from the first profits. *The post exchange is responsible for the debt, and not the Government.* This will be made perfectly clear to those extending credit. (Emphasis ours.)

The United States Government has thus specifically denied any responsibility or liability for the activities of an army post exchange. Appellee submits that this provision clearly shows the purely paternal nature of the government's interest in the post exchange.

Appellant has directed this Court's attention to various opinions of the Judge Advocate General to the effect that an army post exchange is a governmental instrumentality. Aside from the fact that such opinions have no real value in the determination of this question, it is interesting to note that the opinions of the Judge Advocate General have not always been consistent with the conclusion that post exchanges are instrumentalities of the United States Government. The rulings of the Judge Advocate General have included opinions that the United States is not interested in the prosecution of the drawers of dishonored checks held by a post exchange (R. 45); that the post exchange is subject to the stamp tax imposed by the Revenue Act of October 22, 1914 (R. 48) and the freight tax imposed by the Revenue Act of October 3, 1917 (R. 48) which exempted "services rendered to the United States". (38 Stats. 745, 752.) Further, the Judge Advocate General in an opinion rendered June 4, 1918, said:

> "* * * A post exchange is a voluntary unincorporated cooperative association of Army organizations, a kind of cooperative store, in which all share in the benefits and all assume a position analogous to partners. Contracts to purchase goods entered into by the proper officers of a post exchange should be tested by the same rules of obligation which govern like agreements of individuals * * *" (R. 50.)

Appellee submits that a consideration of the facts discussed hereinabove necessitates a conclusion that army post exchanges are not instrumentalities or agencies of the United States Government through which it exercises its constitutional authority. The direct refusal to accept any liability for the obligations of the post exchange clearly indicates that the Secretary of War does not regard the post exchanges as integral parts of the United States Army. It is hardly conceivable that the Secretary of War would issue a statement that the obligations incurred by the Quartermaster's Corps of the United States Army are not the obligations of the United States Government. The distinction between the treatment of the Quartermaster's Corps and the post exchange is indicative of the fundamental difference between the former as an integral part of the Army and the latter as an independent "employee" organization.

Without here questioning whether there is constitutional authority for the Government of the United States engaging in the restaurant, barbering or taxi businesses if it desired to do so, it is clear that this has not been attempted in the case of the army post

exchange. If appellant admits, as appellee believes it must, that the army post exchange is not synonymous with the United States Army, appellant is faced with the burden of showing some legislative authority for the creation by the Secretary of War of a governmental instrumentality of the nature of governmental corporations such as the Reconstruction Finance Corporation. Appellant has not adduced a single item of legislative authority which specifically provides for the creation of army post exchanges. As discussed heretofore the authority given to the Secretary of War to "prepare regulations for the administration of the affairs of the army" (16 Stat. 319) did not authorize that official to legislate by regulation.

United States v. George, 228 U. S. 14, 20;
International Ry v. Davidson, 257 U. S. 506, 514.

In view of this complete lack of congressional provision for the formation of post exchanges as governmental instrumentalities appellee submits that such organizations should be regarded as in the same category as private commercial units engaged in selling merchandise and furnishing services to soldiers and civilians. If, as appellant contends, there is an implied immunity of all instrumentalities of the United States Government every presumption should be indulged against any interpretation which would deprive the states of their taxing jurisdiction over what is in all physical respects a huge commercial enterprise. The validity of appellee's contention becomes clear when it is realized that a contrary interpretation will deprive the states of their taxing juris-

diction over sales to civilian employees of the exchange, and of the post, undoubtedly residents of the State, to the detriment both of the State and of the citizens engaged in business therein. In this regard the excerpt from Collier's Magazine shows four hundred and forty civilian employees at the Camp Blanding Post Exchange and, of course, there are in addition large numbers of civilians employed at each army camp.

Appellant has, at page 17 of its brief, referred to the uses to which the profits of the post exchange are put, and stated that those purposes are governmental and impliedly concluded that the post exchange is by reason thereof a governmental instrumentality. Without discussing the merits of the premise set forth by appellant it is sufficient to refer to the language of this Court in *Allan v. Regents of University System of Georgia*, 304 U. S. 439, at page 452, which appellee believes is directly applicable in this argument:

> "If it be conceded that the education of its prospective citizens is an essential governmental function of Georgia, as necessary to the preservation of the State as is the maintenance of its executive, legislative and judicial branches, *it does not follow that if the State elects to provide the funds for any of these purposes by conducting a business, the application of the avails in aid of necessary governmental functions withdraws the business from the field of Federal taxation.*" (Emphasis ours.)

Appellant cites five cases upholding its position. On the converse side of the judicial picture of this problem are five cases, in addition to the case at bar, in

which the Courts have upheld the contention made by appellee:

Keane v. United States, 272 Fed. 577 (C. C. A. 4);

Pan-American Petroleum Corp. v. Alabama, 67 Fed. (2d) 590 (C. C. A. 5), certiorari denied, 291 U. S. 670;

Thirty-First Infantry Post Exchange v. Posadas, 54 Phil. Rep. 866, certiorari denied, 283 U. S. 839;

People v. Standard Oil Company of California, 218 Cal. 123 (reversed on other grounds, 291 U. S. 242);

Post Exchange, The Army War College v. District of Columbia (Board of Tax Appeals of District of Columbia, Opinion No. 283, July 24, 1941).

While the number of opinions of other Courts is not pertinent here appellee feels that they do indicate that there is considerable judicial dissent from the position that army post exchanges are instrumentalities of the United States Government. Appellee submits that the facts show that the correct view is as expressed by the Supreme Court of California in *People v. Standard Oil Company of California,* supra, at page 128, that an army post exchange is:

> "An organization largely engaged in business of a private nature and that sales to it should not be beyond the reach of the taxing power of the state wherein it is located and that it is not one of those agencies through which the Federal government directly exercises its constitutional or sovereign power."

II. THE CALIFORNIA MOTOR VEHICLE FUEL LICENSE TAX ACT DOES NOT IMPOSE A TAX UPON SALES TO ARMY POST EXCHANGES.

(The relevant provisions of California Motor Vehicle Fuel License Tax Act (California Stats. 1923, page 571, as amended) are set forth in appendix of this brief.)

Appellant initiates its argument on this point with a discussion of the contention that a state cannot levy a tax directly upon an instrumentality of the Federal Government. A brief answer to that argument will be made hereafter. However, the contention of appellant is without pertinence to the case at bar for the reason that the California Motor Vehicle Fuel License Tax Act levies a tax on the vendor and not on the vendee.

Appellant, however, contends that the legal incidence of the tax is upon the vendee. Appellant relies for this conclusion on the provisions of section 11 of the statute (Appendix, pp. iii-iv), which provides for refund to the purchaser of any amount of tax which he paid, either as part of the purchase price or directly, where the fuel was not used on the highways. Appellee believes that there is no basis for the conclusion which appellant draws from section 11 of the Act. This provision, as does section 10 (Appendix, pp. ii-iii) granting, among other things, an exemption of fuel to be exported, indicates the legislative intention to impose the tax for the privilege of distributing motor vehicle fuel measured by the gallonage actually used on the public highways of this state. The legislature knew that in nearly every instance the distributor

would reimburse itself for the amount of tax levied upon it and in section 11 adopted the only feasible and just means of refund.

The nature of the tax is clear from the statute. It is specifically provided in section 3 (Appendix p. i):

> "A license tax is hereby imposed for the privilege of distributing * * * any motor vehicle fuel * * *"

Section 4 provides that the tax shall be a lien on all property of the distributor. (Appendix, pp. i-ii.)

Section 16 provides for an action only by the *distributor* for the recovery of tax paid under protest. (Appendix, pp. iv-v.)

There is not a single word in the statute which places any liability for the tax upon the vendee.

The Appellate Courts of California have consistently held the Motor Vehicle Fuel License Tax Act to be an "excise or occupation tax upon distributors of motor vehicle fuel".[2]

People v. Ventura Refining Co., 204 Cal. 286, 294;

Rio Grande Oil Co. v. City of Los Angeles, 6 Cal. App. (2d) 200, 201;

Standard Oil Co. v. Johnson, 10 Cal. (2d) 758, 767.

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[2]Cf. cases involving Retail Sales Tax Act of California which contains a specific reimbursement section (Section 8½, Retail Sales Tax Act).

DeAryan v. Akers, 12 Cal. (2d) 781;

National Ice and Cold Storage Co. v. Pacific Fruit Express, 11 Cal. (2d) 283.

See also:

Western Lithograph Co. v. State Board of Equalization, 11 Cal. (2d) 156, 162-3.

Under the rule set forth in *Federal Land Bank v. Bismarck Lumber Co.,* 314 U. S. 95, these determinations of the incidence of the tax by the California Courts are controlling.

Appellee submits that appellant's contentions on this point are without merit and that the California Motor Vehicle Fuel License Tax Act does not impose any tax upon the vendee of motor vehicle fuel.

A very similar motor vehicle fuel tax act was considered by the Supreme Court of North Dakota in *Federal Land Bank of St. Paul v. De Rochford,* 287 N. W. 522, 69 N. D. 382 (1939).[3] The North Dakota Fuel Tax Act there involved levied a gallonage tax on dealers, provided for "passing on" to the vendee and contained a refund provision nearly identical with section 11 of the California Act. The Supreme Court of North Dakota in an exhaustive opinion held that the tax was levied on the privilege of engaging in the sale of motor vehicle fuel and was not a tax on the Federal Land Bank. This conclusion applies equally to the tax here in question and appellee submits that this tax was properly levied upon appellant.

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[3]It should be noted that the government has seemingly accepted the interpretation of the North Dakota Court in the *DeRochford* case. See Appendix A, page 74, Brief of Solicitor General in *Federal Land Bank v. Bismarck Lumber Co.,* supra.

III. A DIRECT TAX UPON AN INSTRUMENTALITY OF THE FEDERAL GOVERNMENT IS NOT INVALID.

Although appellee believes that the taxability of federal instrumentalities is not involved in the case at bar for the reasons discussed heretofore, appellant's reference to the contention makes it necessary to include a very brief discussion upon it.

Unquestionably Congress has the power to create governmental instrumentalities and to protect these instrumentalities, in their functioning within their constitutional jurisdiction, by exemption from state taxation.

Federal Land Bank v. Bismarck Lumber Co., supra;

Pitman v. Home Owners Loan Corp., 308 U. S. 21.

However, there is considerable question whether such immunity exists in the absence of congressional action.

Graves v. New York ex rel. O'Keefe, 306 U. S. U. S. 46, 478;

Stokes, State Taxation and the New Federal Instrumentalities, 22 Iowa Law Review 39, 49.

This question looms larger where the particular instrumentality engages nearly entirely in activities which are of the nature of commercial business enterprises.

Cf. *Allen v. Regents of University System of Georgia*, 304 U. S. 439.

As the solicitor general said in the petitioner's brief in *Federal Land Bank v. Bismarck Lumber Co.*, supra (p. 52, Petitioner's Brief):

> "'The implication necessarily drawn from these decisions is that the tax immunity of the United States and its instrumentalities is, within broad limits, a question simply of congressional enactment. There are, it is true, constitutional limitations. But as a matter of rudimentary constitutional theory they leave to Congress a broad field.'"

Assuming that this is a correct exposition of the decisions, the conclusion is inescapable that there is no general immunity from state taxation in favor of army post exchanges.

See Senate Committee Report No. 1625, page 3 this brief.

CONCLUSION.

An army post exchange is not the United States nor is it an instrumentality thereof. It is a private cooperative enterprise in which army personnel cooperate. Congress has not granted to it any immunity from state taxation and there is no basis for any implied immunity.

It is accordingly respectfully submitted that the decision below should be affirmed.

Dated, San Francisco, California,
April 29, 1942.

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(Appendix Follows.)

Appendix

CALIFORNIA MOTOR VEHICLE FUEL LICENSE TAX ACT. (STATUTES 1923, PAGE 571, AS AMENDED.)

"Sec. 3. A license tax is hereby imposed for the privilege of distributing, within the meaning of section 7 of this act, any motor vehicle fuel. Said license tax shall be according to or measured by the gallonage of motor vehicle fuel so distributed in this State and shall be at the rate of three cents for each gallon of such fuel refined, manufactured, produced, blended or compounded by such distributor in this State and so distributed by him in this State, or imported by such distributor into and so distributed by him in this State otherwise than in the original package or container in which such motor vehicle fuel was imported into this State, and for each gallon of motor vehicle fuel imported into this State and thereafter acquired by such distributor in the original package or container in which the same was imported and thereafter so distributed by such distributor otherwise than in the original package or container in which the same was imported into this State."

"Sec. 4. License taxes herein required to be paid shall be payable in monthly insfallments to the State Controller for the month ending April 30, 1931, and each and every calendar month thereafter. The license tax shall be a lien upon all property of the distributor, attaching at the time of delivery or distribution subject to said license tax, having the effect of an execution duly levied against all property of the dis-

tributor, and remaining until the license tax is paid, or the property sold in payment thereof. * * *

"The Controller must also immediately transmit notice of such delinquency to the Attorney General who shall at once proceed to collect all sums due to the State from any such distributor hereunder by bringing suit against the necessary parties to effect forfeiture of the bond or bonds of the distributor or of the money or securities deposited by the distributor with the State Treasurer in accordance with the terms of section 2 of this act, reducing any deficiency to judgment against the distributor.

* * * * * * *

"In any suit brought to enforce the rights of the State hereunder the assessment roll prepared by the State Board of Equalization pursuant to section 6 of this act, or a copy of so much thereof as is applicable in such suit, duly certified by the Controller showing unpaid license taxes assessed against any distributor, shall be prima facie evidence of the assessment of the license tax, the delinquency thereof, the amount of the license tax, penalties and costs due and unpaid to the State, that the distributor is indebted to the people of the State of California in the amount of such license tax and penalties therein appearing unpaid and that all the forms of law in relation to the assessment and levy of such license tax have been fully complied with by all persons required to perform administrative duties under this act."

"Sec. 10. The provisions of this act requiring the payment of license taxes shall not be held or construed

to apply to motor vehicle fuel imported into this State in interstate or foreign commerce and intended to be sold in the original and unbroken tank cars or other original receptacles, containers or packages and so sold while the same are in interstate or foreign commerce, nor to any motor vehicle fuel exported from this State by the distributor or delivered by the distributor to any vessel clearing from a port of this State for a port outside of this State and actually exported from this State in such vessel, nor to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, but every distributor shall be required to report such exports and sales to the State Board of Equalization in such detail as that board may require, otherwise the exemption herein granted shall be null and void and all such fuel shall be considered distributed in this State subject fully to the provisions of this act. * * *"

"Sec. 11. Any person, firm, association or corporation who shall buy and use any motor vehicle fuel for purposes other than in motor vehicles operated upon the public highways of the State of California, or who shall export the same for use outside of this State, or any employee of the United States Government, who shall buy any motor vehicle fuel and use the same exclusively in the transportation of rural free delivery mail and special delivery mail or the government of the United States or any department thereof which buys motor vehicle fuel for official use

of said government or department and on which fuel no claim for exemption from payment of the tax imposed by this statute could be filed in accordance with section 10 of this act and who shall have paid any license tax for such motor vehicle fuel hereby required to be paid, either directly or to the vendor from whom it was purchased, or indirectly by the adding of the amount of such license tax to the price of such fuel, shall be reimbursed and repaid the amount of such license tax paid by him or it upon presenting to the State Controller an affidavit supported by the original invoice or invoices showing such purchase, which affidavit shall be verified by the oath of the claimant and shall state the total amount of such fuel so purchased and that the claimant has paid the price thereof and the manner and the equipment in which the claimant has used the same; provided, however, that any motor vehicle fuel carried from this State in the fuel tank of a motor vehicle shall not be considered as exported from this State. * * *"

"Sec. 16. No injunction or writ of mandate or other legal or equitable process shall ever issue in any suit, action or proceeding in any court against this State or against any officer thereof, to prevent or enjoin the collection under this act of any license tax assessed by the State Board of Equalization; but after payment of any such license tax under protest duly verified and setting forth the grounds of objection to the legality of such license tax, the distributor paying such license tax may bring an action against the State

Treasurer in the superior court of the county of Sacramento for the recovery of the license tax so paid under protest. * * *

"In no case shall any judgment be rendered in favor of the plaintiff in any action brought against the State Treasurer to recover any license tax paid hereunder, when such action is brought by or in the name of an assignee of the distributor paying said license tax, or by any person, company or corporation other than the person, company or corporation that has paid such license tax."

No. 1125

In the Supreme Court of the United States

OCTOBER TERM, 1941

STANDARD OIL COMPANY OF CALIFORNIA, APPELLANT

v.

CHARLES G. JOHNSON, AS TREASURER OF THE STATE OF CALIFORNIA

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INDEX

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The United States presents this brief as amicus curiae because it is vitally interested in the question which the parties seek to raise, namely, whether an army post exchange is a Federal instrumentality, and is anxious to have the question litigated only in a controversy in which the issue is properly raised. We think that this Court has no jurisdiction under Section 237 (a) of the Judicial Code to consider the issue upon appeal, and that the record does not present a Federal ques-

tion which could support a writ of certiorari under Section 237 (b).

1. *Preliminary.*—This case arose in the California courts as a suit for refund of gasoline taxes which the Standard Oil Company of California brought against the State Treasurer. The taxes had been paid by the Oil Company to the State with respect to gasoline which it had sold to several United States Army Post Exchanges, none of which is located on territory subject to the exclusive jurisdiction of the United States.

The taxes were imposed by the California Motor Vehicle Fuel License Tax Act (Cal. Stats. 1923, p. 571, as amended by Cal. Stats. 1925, p. 659; Cal. Stats. 1927, p. 1308; Cal. Stats. 1929, pp. 112, 1551; Cal. Stats. 1931, pp. 105, 1652, 2001, 2288; Cal. Stats. 1933, pp. 1249, 1631; Cal. Stats. 1935, pp. 1646, 1692, 1717, 1760; Cal. Stats. 1937, p. 2217; Cal. Stats. 1939, pp. 1714, 2222), which provides in part as follows:

> SEC. 3. A license tax is hereby imposed for the privilege of distributing, within the meaning of section 7 of this act, any motor vehicle fuel. Said license tax shall be according to or measured by the gallonage of motor vehicle fuel so distributed in this State and shall be at the rate of three cents for each gallon of such fuel refined, manufactured, produced, blended or compounded by such distributor in this State and so distributed by him in this State, or imported by such distributor into and so distributed

> by him in this State otherwise than in the original package or container[1] * * *.

The Oil Company sought refund on two main grounds: (1) that the taxes were invalid under the Federal Constitution since they were imposed with respect to sales to Federal instrumentalities; (2) that, in any event, the sales in question were exempt under Section 10 of the California Act which provides:

> SEC. 10. The provisions of this act requiring the payment of license taxes shall not be held or construed to apply * * * to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government, * * *.

(a) As to the first ground, it is now clear that a state tax may be imposed upon a vendor[2] with

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[1] Section 7 of that Act provides (Cal. Stats. 1937, p. 2219):

"SEC. 7. For the purposes of this act all motor vehicle fuel sold, donated, consigned for sale, bartered or used shall be deemed to be distributed, and to insure the proper administration of this act and to prevent evasion of the license tax hereby imposed it shall be presumed that all motor vehicle fuel refined, manufactured, produced, blended or compounded in this State, or imported into this State, and no longer in the possession of the distributor, has been distributed unless the contrary is established; * * *.

"Nothing in this act shall be construed as requiring the payment of the license tax herein specified upon more than one sale, distribution or transfer of the same motor vehicle fuel."

[2] As shown by the quoted portions of Sections 3 and 7 and by Sections 1, 4, 5, 6, 8, and 9 of the California Motor Ve-

respect to sales to the United States. See *Alabama* v. *King & Boozer*, 314 U. S. 1, 9. To the extent that a different view once prevailed in such cases as *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, it seems to have been rejected in the *King & Boozer* decision. Accordingly, the Oil Company's attempt to avoid the tax on the ground that it is unconstitutional does not present a substantial Federal question.

(b) As to the second ground, it is clear that whatever exemption the Oil Company may claim is derived solely from the California statute. There is no Constitutional prohibition against a state tax upon the vendor with respect to sales to the United States or its instrumentalities. And so far as the

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hicle Fuel License Tax Act, the tax is imposed solely on the distributor—i. e., the vendor. This is clear from the Act and the California courts have so held. *People* v. *Ventura Refining Co.*, 204 Cal. 286, 294; *Standard Oil Co.* v. *Johnson*, 10 Cal. (2d) 758, 767–768; *Rio Grande Oil Co.* v. *Los Angeles*, 6 Cal. App. (2d) 200; cf. *Western L. Co.* v. *State Bd. of Equalization*, 11 Cal. (2d) 156. We may assume, *arguendo*, that a post exchange, as the distributor, may become liable for tax with respect to sales made by it. But this was not the situation here. The taxes here in controversy were imposed upon the Oil Company as vendor; the post exchanges were simply vendees (R. 2–5, 73, 76–77), and the legal incidence of the taxes did not fall upon them. Although the Oil Company may contend that the tax is imposed upon the vendee, the plain fact is that it is suing in its own name and on its own behalf for refund of taxes which it paid as vendor. Moreover, to the extent that California does impose any gasoline taxes upon Post Exchanges, those taxes have been paid by the Post Exchanges in accordance with the terms of the Hayden-Cartwright Act discussed in footnote 5, *infra*, p. 8.

Constitutional issue is involved it makes no difference whether a post exchange is a Federal instrumentality; a state tax upon the vendor is valid even where the purchaser is the United States itself. The Oil Company's claim to exemption upon the second ground is therefore founded solely upon the state statute which by its terms has undertaken to exempt sales to the United States "or any department thereof." Whether a post exchange is a "department" of the United States within the meaning of the California statute is purely a question of construction of the state statute,[3] as will be shown in greater detail, *infra*.

2. *This case is not properly before the Court under Section 237 (a) of the Judicial Code.*—The jurisdictional statement filed by the appellant relies upon Section 237 (a) of the Judicial Code as the basis for jurisdiction (p. 2), and Section 237 (a) provides:

> SEC. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or *where*

[3] Even a federal instrumentality such as the Tennessee Valley Authority which is equivalent to the United States in the constitutional sense may or may not be equivalent of the United States or a department thereof within the meaning of a statute. *Pierce* v. *United States*, 314 U. S. 306; cf. *United States* v. *Marxen*, 307 U. S. 200, 203. The question is one of statutory construction, and here it is one of construction of the state statute.

> *is drawn in question the validity of a statute of any State,* on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon appeal * * * [Italics supplied.]

It is plain that these provisions are applicable here only to the extent that the state court sustained the validity of the California statute as against the contention that it was repugnant to the Constitution. But the only contention of unconstitutionality was that a state may not tax a vendor with respect to sales to the United States or its instrumentalities, and that contention does not raise a substantial Federal question. That question was unambiguously answered in *Alabama* v. *King & Boozer,* 314 U. S. at 9, and cannot form the basis for an appeal under Section 237 (a).

Moreover, it is clear that Section 237 (a) does not authorize an appeal with respect to the court's ruling on the Oil Company's contention that the sales were exempt under Section 10 of the California statute. In holding that the sales were not exempt under the statute, the California court was not sustaining the validity of a state statute; the statute was valid whether or not the exemption applied, and the court simply ruled that the exemption did not apply.

3. *This case does not involve any substantial Federal question which could support a writ of*

certiorari under Section 237 (b) of the Judicial Code.—We think it abundantly clear that neither of the two grounds relied upon by the Oil Company can form the basis for an appeal under Section 237 (a). Under Section 237 (c), however, the Court is directed to treat the appellant's papers as a petition for certiorari where the proper mode of invoking review is by a petition for certiorari. We submit that this Court could have no jurisdiction over this controversy even through certiorari.

This case comes here from a state court, and Section 237 (b) makes it plain that the writ may issue only where a Federal right is involved.[1] But as shown above, the claim that the California statute violates the Constitution of the United States does not present a substantial Federal

[1] Section 237 (b) provides as follows:

"(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. * * *"

question, and, as we shall undertake to show in greater detail, the claim to exemption under Section 10 of the California statute does not present a Federal question at all.

The exemption accorded by Section 10 of the California statute applies to sales of gasoline made "to the government of the United States or any department thereof for official use of said government." If any army post exchange is not a "department" within the meaning of Section 10, the exemption does not apply. And whether it is a "department" is solely a question of interpretation of the California statute. There is no basis whatever for injecting into this controversy the question whether a post exchange is a federal instrumentality for the purpose of determining whether a state tax imposed upon the post exchange would be valid under the Federal Constitution.[5]

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[5] Moreover, to the extent that any gasoline taxes are imposed *upon* a post exchange itself, Congress has made specific provision with respect thereto. Section 10 of the Hayden-Cartwright Act, c. 582, 49 Stat. 1519, provides that all state taxes upon sales of gasoline may be levied in the same manner and to the same extent when such sales are made by or through post exchanges or similar agencies located on United States military or other reservations, when such gasoline is not for the exclusive use of the United States. We are informed that the War Department has construed these provisions as being applicable to the military reservations in question and that under its direction, the very post exchanges here in controversy have filed returns with the State of California and have made payment of taxes upon *their* sales of gasoline during the very period here in question.

It is entirely immaterial that the California court may have considered decisions of this Court relating to intergovernmental tax immunity under the Constitution as an aid to the interpretation of the state statute. The pivotal consideration is that the relief, if any, which the Oil Company might obtain on this ground would be relief under the *state* statute, not under the Federal Constitution.

The decision in *Miller's Executors* v. *Swann*, 150 U. S. 132, is analogous. In that case a decision of the Supreme Court of Alabama had turned upon the proper construction of an Alabama statute authorizing the sale of certain lands which had been granted to Alabama by Congress "in accordance with the acts of Congress granting the same." The Alabama court had construed the federal acts, thus incorporated into the state law, as imposing a condition precedent to a sale. An appeal was taken to this Court upon the ground that the acts of Congress, properly construed, did not impose such a condition. The appeal was dismissed for lack of a federal question. The Court said (pp. 136–137):

> The question is not what rights passed to the State under the acts of Congress, but what authority the railroad company had under the statute of the State. The construction of such a statute is a matter for the state court, and its determination thereof is binding on this court. *The fact that the state statute and the mortgage*

> *refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question.* A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin. [Italics supplied.]

A similar situation was presented in *Louisville & Nashville R. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, in which it was suggested that jurisdiction of the writ of error might be sustained on the ground that the act of Louisiana under which appellee operated required that it comply with an act of Congress. The Court held that the writ of error could not be sustained on that basis, saying (p. 303):

> But when, as here, the foundation of the right claimed is a state law, the suit to

assert it arises under the state law none the less that the state law has attached a condition that only alien legislation can fulfill. The state law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfilment is like the reference to a document that it adopts and makes part of itself. The suit is not maintained by virtue of the Act of Congress but by virtue of the Louisiana statute that allows itself to be satisfied by that Act. See *Interstate Street Ry.* v. *Massachusetts,* 207 U. S. 79, 84.

Compare *Carmichael* v. *Southern Coal Co.,* 301 U. S. 495, 507.

As pointed out by Mr. Justice Cardozo in *Gully* v. *First Nat. Bank,* 299 U. S. 109, 115: "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit." And, as in the *Gully* case, the instant case presents a situation where "the most one can say is that a question of federal law is lurking in the background * * *." *Id.,* p. 117.[6]

[6] The principle is also illustrated by cases in which the statute or law of one State is drawn in question in the courts of another State. Thus, in *City Bank Farmers' Trust Co.* v. *New York Central R. R. Co.,* 253 N. Y. 49, the issue was whether a transfer was taxable by the laws of Pennsylvania. The Supreme Court of Pennsylvania, in an earlier decision, had held that the Pennsylvania reciprocity provisions did not include residents of New York dying within a certain period, because the Tax Commission of New York and a New York statute had stated that the New York law did not grant a similar exemption to residents of Pennsylvania. The New York Court of Appeals, however, held the ruling

The distinction was recently made clear in *State Tax Comm'n. v. Van Cott*, 306 U. S. 511. There, the Supreme Court of Utah had held that the salary of an employee of the Reconstruction Finance Corporation was not taxable under the Utah income-tax law which exempted salaries "for services rendered in connection with the exercise of an essential governmental function." It was not clear from the opinion of the Utah court whether its ruling was based upon an interpretation of its own statute or whether it undertook to grant the exemption under the compulsion of the Federal Constitution; and these two grounds were so "interwoven" that this Court was "unable to conclude

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of the Tax Commission to be erroneous, and the statute to be unconstitutional. But, in determining the law of Pennsylvania, the court, speaking through Chief Judge Cardozo, said (p. 63):

"The judgment before us may not stand while the judgment of the Supreme Court of Pennsylvania is standing unchanged. That judgment, right or wrong, decides the whole issue. The issue is merely this: do the laws of Pennsylvania, properly interpreted, impose a tax upon the plaintiff's shares of stock in a Pennsylvania corporation? The Supreme Court of Pennsylvania has said that they do. In reaching that conclusion it has had occasion to consider the meaning and effect of the statutes of New York. What it has said in that regard does not constitute its decision. What it has said in that regard is a step in the process of reasoning leading up to the decision. In the end it has determined, not the meaning and effect of the statutes of New York, but the meaning and effect of the statutes of Pennsylvania. As to that, as we have said, its authority is final."

See also *Ingenohl* v. *Olsen & Co.*, 273 U. S. 541; *Godard* v. *Gray*, L. R. 6 Q. B. 139, 151.

that the judgment" rested "upon an independent interpretation of the state law" (306 U. S. 511, 514). Furthermore, the intervening decision in *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, showed that the state court had erroneously construed the Federal Constitution. The Court therefore remanded the case to the Supreme Court of Utah for further consideration. In taking this action, this Court adverted to the familiar rule that if the state court had been—

> only incidentally referring to decisions of this Court in determining the meaning of the state law, and had concluded therefrom that the statute was itself intended to grant exemption to respondent, this Court would have no jurisdiction to review that question. [306 U. S. 511, 514.]

In *Minnesota* v. *National Tea Co.*, 309 U. S. 551, this Court similarly refused to review a decision of the Supreme Court of Minnesota because it was not clear from the opinion of the state court whether its decision in holding a state statute invalid was grounded upon the state or federal constitution. This Court recognized the possibility that "the state court employed the decisions under the federal constitution merely as persuasive authorities for its independent interpretation of the state constitution", and said that "If that were true, we would have no jurisdiction to review" (309 U. S. 551, 556). The case was remanded to the state court in order that it might clarify its ground of decision.

The instant case follows a fortiorari from the *Van Cott* and *National Tea Co.* cases. In each of those cases the Court refused to pass upon the merits where it was not certain whether the state court had rested its decision upon federal or state grounds. There was a possibility in those cases that the decisions might have been rested exclusively upon either Federal or state grounds, and the remand permitted the state court to indicate which ground was selected as dispositive of the controversy. In the instant case, however, the state court could not possibly have rested its decision upon Federal grounds. At most, a federal question merely lurked in the background of the interpretation of section 10 of the state act, and could not constitute the operative basis for decision. Accordingly, not only should the Court refuse to pass upon the issue here just as it did in the *Van Cott* and *National Tea Co.* cases, but there may not even be any occasion for a remand to the state court for the purpose of clarifying its position. The California court could not, if it wished, rest its decision on constitutional grounds. The exemption, if any, to which the Oil Company may be entitled would be derived solely from the state statute; no principle of constitutional law could be invoked as the operative force requiring the exemption.' However, if the Court should hold that a Post Exchange is a "federal instrumental-

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'To be sharply distinguished are those cases in which federal and state questions are interwoven and where the

ity." in *Query* v. *United States*, No. 619, this case could be remanded to the California court for reconsideration of the state question, as was done in *Patterson* v. *Alabama*, 294 U. S. 600, 607.

Nor is any federal question raised in this case by reason of the Act of October 9, 1940, c. 787, 54 Stat. 1059, which undertakes to permit states to levy taxes within areas that are otherwise subject to the exclusive territorial jurisdiction of the United States. That statute simply extends the territorial jurisdiction of the states to embrace

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state court's decision rests upon what it conceives to be the "compulsion of federal law." See *Breisch* v. *Central R. R. of N. J.*, 312 U. S. 484, 489. See also *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120; *Tipton* v. *Atchison Ry. Co.*, 298 U. S. 141, 151–152. In that situation this Court has felt free to reexamine the state court's ruling. But it will be observed that in the instant case no provision of federal law has any compelling effect whatever upon the interpretation of the state statute. The State could have granted or withheld the exemption at will, and whatever aid the California court may have sought from the decisions of this Court in construing the exemption certainly cannot be treated as the equivalent of that "compulsion of federal law" referred to in the *Breisch* decision.

Moreover, it should also be kept in mind that the issue in the *Breisch* case was not whether there was a federal question within the meaning of Section 237 (a) or (b) of the Judicial Code. That case came to the federal courts through diversity of citizenship, and the existence of a federal question was not a necessary condition to jurisdiction. The issue in that case related to the extent to which a federal court would be bound by state court decisions. Although the issues appear to be superficially similar, it is by no means clear that the same criteria are controlling in determining the existence of a federal question for the purpose of marking out the limits of this Court's appellate jurisdiction within the meaning of Section 237.

areas not theretofore within their taxing power. None of the areas in this case (R. 2), however, is within the exclusive jurisdiction of the United States, so that there can be no question whatever as to the application or interpretation of the Act of October 9, 1940.

CONCLUSION

This case is not properly before the Court under Section 237 (a) of the Judicial Code, and there is not presented any federal question that could support a writ of certiorari under Section 237 (b). The case should be dismissed. However, if the Court should hold that a Post Exchange is a "federal instrumentality" in the constitutional sense in *Query* v. *United States*, No. 619, the Court might properly remand this case for reconsideration of the state question as was done in *Patterson* v. *Alabama*, 294 U. S. 600, 607.

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SUPREME COURT OF THE UNITED STATES.

No. 1125.—October Term, 1941.

Standard Oil Company of California, Appellant, *vs.* Charles G. Johnson, as Treasurer of the State of California.	On Appeal from the Supreme Court of the State of California.

[June 1, 1942.]

Mr. Justice Black delivered the opinion of the Court.

The California Motor Vehicle Fuel License Tax Act[1] imposes a license tax, measured by gallonage, on the privilege of distributing any motor vehicle fuel. Section 10 states that the Act is inapplicable "to any motor vehicle fuel sold to the government of the United States or any department thereof for official use of said government." The appellant, a "distribtuor"[2] within the meaning of the Act, sold gasoline to the United States Army Post Exchanges in California. The State levied a tax, and the appellant paid it under protest. The appellant then filed this suit in the Superior Court of Sacramento County seeking to recover the payment on two grounds: (1) that sales to the Exchanges were exempt from tax under Section 10; (2) that if construed and applied to require payment of the tax on such sales the Act would impose a burden upon instrumentalities or agencies of the United States contrary to the federal constitution. Holding against the appellant on both grounds, the trial court rendered judgment for the State. The Supreme Court of California affirmed. 19 Adv. Cal. Rep. 125. Since validity of the State statute as construed was drawn in question on the ground of its being repugnant to the Constitution, we think the case is properly here on appeal under Section 237(a) of the Judicial Code.

[1] Cal. Stats. 1923, pp. 572, 573, 574; 1927, p. 1309; 1933, pp. 1636, 1637; 1937, p. 2219.

[2] Section 7 of the Act provides: "For the purpose of this act all motor vehicle fuel sold, donated, consigned for sale, bartered or used shall be deemed to be distributed. . . ."

Since Section 10 of the California Act made the tax inapplicable "to any motor vehicle fuel sold to the government of the United States or any department thereof", it was necessary for the Supreme Court of California to determine whether the language of this exemption included sales to post exchanges. If the court's construction of Section 10 of the Act had been based purely on local law, this construction would have been conclusive, and we should have to determine whether the statute so construed and applied is repugnant to the federal constitution. But in deciding that post exchanges were not "the government of the United States or any department thereof", the court did not rely upon the law of California. On the contrary, it relied upon its determination concerning the relationship between post exchanges and the government of the United States, a relationship which is controlled by federal law. For post exchanges operate under regulations of the Secretary of War pursuant to federal authority. These regulations and the practices under them establish the relationship between the post exchange and the United States government, and together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined. It was upon a determination of a federal question, therefore, that the Supreme Court of California rested its conclusion that, by Section 10, sales to post exchange were not exempted from the tax. Since this determination of a federal question was by a state court, we are not bound by it. We proceed to consider whether it is correct.

On July 25, 1895, the Secretary of War, under authority of Congressional enactments[3] promulgated regulations providing for the establishment of post exchanges.[4] These regulations have since been amended from time to time and the exchange has become a regular feature of Army posts. That the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law.[5]

Congressional recognition that the activities of post exchanges

[3] 16 Stat. 315, 319; 18 Stat. 337.

[4] G. O. 46, Hdqrs. of the Army.

[5] United States v. Eliason, 16 Pet. 291, 302; Gratiot v. United States, 4 How. 80, 117-118.

are governmental has been frequent. Since 1903,[6] Congress has repeatedly made substantial appropriations to be expended under the direction of the Secretary of War for construction, equipment, and maintenance of suitable buildings for post exchanges. In 1933 and 1934, Congress ordered certain moneys derived from disbanded exchanges to be handed over to the Federal Treasury.[7] And in 1936, Congress gave consent to state taxation of gasoline sold by or through post exchanges, when the gasoline was not for the exclusive use of the United States.[8]

The commanding officer of an Army Post, subject to the regulations and the commands of his own superior officers, has complete authority to establish and maintain an exchange. He details a post exchange officer to manage its affairs. This officer and the commanding officers of the various company units make up a council which supervises exchange activities. None of these officers receives any compensation other than his regular salary. The object of the exchanges is to provide convenient and reliable sources where soldiers can obtain their ordinary needs at the lowest possible prices. Soldiers, their families, and civilians employed on military posts here and abroad can buy at exchanges. The government assumes none of the financial obligations of the exchange. But government officers, under government regulations, handle and are responsible for all funds of the exchange which are obtained from the companies or detachments composing its membership. Profits, if any, do not go to individuals. They are used to improve the soldiers' mess, to provide various types of recreation, and in general to add to the pleasure and comfort of the troops.

From all of this, we conclude that post exchanges as now operated, are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the constitution and federal statutes. In concluding otherwise the Supreme Court of California was in error.

Whether the California Supreme Court would have construed the Motor Vehicle Fuel License Act as applicable to post exchanges

[6] 32 Stat. 927, 938.

[7] 47 Stat. 1571; 1573; 48 Stat. 1224, 1229. See Hearings, House, War Department Appropriation Bill, 1934, 72d Cong., 2d Sess., 648.

[8] 49 Stat. 1519, 1521, amended by 54 Stat. 1059, 1060-1061.

if it had decided the issue of legal status of post exchanges in accordance with this opinion, we have no way of knowing. Hence, a determination here of the constitutionality of such an application of the Act is not called for by the state of the record. Cf. *Minnesota* v. *National Tea Co.*, 309 U. S. 551, 557. Accordingly, we reverse the judgment and remand the cause to the court below for further proceedings not inconsistent with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.